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—Deeds of Conveyance.
—Wills and Testaments.
—Judicial Proceedings.
—The Sheriff's Deed.
—Public Documents.
XV.—Boundaries.
XVI.—Common Source of Title.
XVII.—Chain of Title.
XVIII.—Estoppel to Deny Title.
XIX.—Damages and Mesne Profits.
XX.—Defenses.
XXI.—Right to Require the Plaintiff's Attorney to Produce his Authority.
XXII.—Adverse Possession in Actions of Ejectment.
XXIII.—Verdicts in Actions of Ejectment.
XXIV.—Judgment and Execution.
XXV.—New Trials in Ejectment:
—At Common Law.
—Error on Part of Court.
—Misconduct on Part of Any Person Intrusted with the Administration of the Law.
—Other Grounds.
—Application for a New Trial.
—New Trials under the Statute.
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CONTENTS.

EDITORIALS.

Code of Procedure in Federal Courts, . . 415
Abolition of Days of Grace, ... 415
Injunction of Labor Unions from Interference with Employees, ... 415

NOTES OF RECENT DECISIONS.

Telephone Companies — Suspended Wire — Injuries, ... 416
Telegraph Companies—Acceptance of Franchise from United States—Power of State to Tax, . 417
Banks—Special Deposit—Gratuitous Bailment, . 417

LEADING ARTICLE.

Insolvent Partner—Distribution of Assets between Individual and Partnership Creditors. By Wm. M. Rockel, ... 418

LEADING CASE.

Competency of Wife as Witness—Bigamy. People v. Quanstrom, Supreme Court of Michigan, Oct. 4, 1892 (with note), ... 423

CORRESPONDENCE.

Opinions of the Supreme Court of Illinois, . 426
WEEKLY DIGEST OF CURRENT OPINIONS, . . 427

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An important report made by a committee at the last annual meeting of the American Bar Association, was that bearing on the necessity for the enactment by congress of a code of criminal procedure for the federal courts. The committee urge as a reason for such action that there are no settled rules of criminal procedure in those courts at the present time, but that the judge must determine questions relating to the organization of the jury by reference to the principles of the common law, to acts of congress, if there are any, or even to the practice in the courts of the particular State in which the federal court is sitting. In respect of indictments, it is said not to be sufficient to charge the commission of the crime in the terms of the federal statute defining the offense, but that it is necessary to add such allegations as were necessary at common law to make the offense complete. See United States v. Carroll, 105 U. S. 611. The committee recommends the adoption of the following resolution, viz: "That a special committee be appointed by the president, whose duty shall be to bring to the attention of congress the resolution above quoted so far as it relates to a code of procedure for the United States courts in criminal proceedings; and that such committee be continued in office until congress shall take some action in the matter."

The Vermont legislature has recently passed a bill, which has since become a law, entitled "An act relating to the maturity of contracts," which abolishes days of grace on promissory notes, drafts and bills of exchange. The question has been agitated for several years, and at a recent meeting of the American Bankers' Association a resolution was adopted recommending such a change, and the representatives of the various State organizations were directed to take the proper steps to bring the matter before their respective legislatures. It is probable, therefore, that "days of grace" will in time be abolished in most, if not all, the States. Their abolition, if it accomplishes no particular good, will at least do no harm. Days of grace in the case of promissory notes are of no practical value to either the borrower or lender. It would be well, however, to retain the old custom in connection with such papers as sight drafts.

The conclusion reached by United States District Judge Beatty, in the case of Cœur D'Alene Consolidated Mining Co. v. Miners' Union, is of special interest in view of the increasing antagonism between labor and capital, and the disposition of the former to assert itself beyond its legal rights. The ruling in the case referred to was that an injunction may be granted to restrain labor unions and members thereof from entering upon complainant's mines, or interfering with the working thereof, or by force, threats or intimidation preventing complainant's employees from working the mines, where the threatened acts are such that their frequent occurrence may be expected, and defendants are insolvent.

The court drew a clear distinction between two classes of cases bearing upon the question. In the one, when the acts complained of consist of such misrepresentations of a business that they tend to its injury and damage to its proprietor, the offense is simply a libel; and in this country the courts have, with great unanimity, held that they will not interfere by injunction, but that the injured party must rely upon his remedy at law. Such was the disposition made of the cases of Francis v. Flinn, 118 U. S. 385; Kidd v. Horry, 28 Fed. Rep. 774; Carwheel Co. v. Bemis, 29 Fed. Rep. 95. On the contrary, when an attempt to injure consists of acts or words which will operate to intimidate and prevent the customers of a party from dealing with, or laborers from working for him, the courts have with almost equal unanimity interposed by injunction, as in the case of Steamship Co. v. McKenna, 30 Fed. Rep. 46; Casey v. Typographical Union, 45 Fed. Rep. 135; Sherry v. Perkins, 147 Mass. 212. The latter is a strong and late case in which a contest arose between some workmen and their employers, and to deter other workmen from entering into his service, they marched in front of his store with a banner bearing an inscription requesting other workmen to keep away. It was held tha

such was a continuous unlawful act, injurious to plaintiff's business and property, and was a nuisance such as a court of equity will grant relief against. In the first mentioned cases it is an injury to a man's business by libeling it; in the other by force, threats and other like means he is prevented from pursuing it; and while the damage might be as great in the one case as in the other—but most likely with different consequences to the good order and peace of the community—the courts have determined upon different remedies. What constitutes such actionable threats or intimidations must be determined in each case from all the surrounding circumstances attending it, if the things done or the words spoken are such that they will excite fear or a reasonable apprehension of damages, and so influence those for whom designed as to prevent them from freely doing what they desire and the law permits, they may be restrained, and the courts will look beyond the mere letter of the act or word into its spirit and intent.

NOTES OF RECENT DECISIONS.

TELEPHONE COMPANIES—SUSPENDED WILE —INJURIES.—In Southwestern Telegraph & Telephone Co. v. Robinson, the United States Circuit Court of Appeals for the Fifth District, held that a telephone company which for several weeks permits its wire to remain suspended across a public highway, a few feet above the ground, is liable to a traveler who comes in contact therewith during an electrical storm and is injured by a discharge of electricity which had been attracted from the atmosphere, since the electricity would have been harmless except for the wire.

The contention of the plaintiff in error in that case was, that the petition states the cause of action to have been the injuries which resulted from the fact that the wire, at the time of the contact with it by the defendant, was charged with electric fluid, for the creation and existence of which the telephone company was in no sense responsible. The court thought, however, that persons must be held to know the ordinary operation of the force of nature and to use proper means to avert danger. If the electric fluid with which the wire of the telephone company was charged at the time was an element, or the main element, in the production of the injuries to the defendant in error, still it is clear that the displaced wire furnised the means of the connection of the dangerous force which resulted in the injury. Science and common experience show that wires suspended in the atmosphere attract electricity in the time of storms, and when so suspended and not insulated are dangerous to persons who may at such times be brought in contact with them. To say that the agency of the telephone wire in the production of the injury was inferior to that of the electric current, which was the main cause, is not satisfactory. It is in fact to admit that the company's displaced wire furnished the means by which the dangerous force was communicated to and injured the defendant in error. True, it was a new force of power which intervened, with the production of which the telephone company had nothing to do. But upon this point, in Insurance Co. v. Tweed, 7 Wall. 52, the court say: "If a new force or power has intervened, of itself sufficient to stand as the misfortune, the other must be considered as too remote." The new force or power here would have been harmless but for the displaced wire, and the fact that the wire took on a new force, with the creation of which the company was not responsible, yet it contributed no less directly to the injury on that account.

In Gleeson v. Railroad Co., 140 U. S. 435, the court held that a landslide in a railway cut, caused by an ordinary fall of rain, is not an act of God which will exempt the railway company from liability to passengers for injuries caused thereby while being carried on the railway; and in that case the court, quoting from an English case, says, "that the plaintiff was entitled to a verdict on the ground that if a person maintains a lamp projecting from a highway for his own purposes, it is his duty to maintain it so as not to be dangerous to persons passing by. And if it causes injuries owing to a want of repair, it is no answer on his part that he had employed a competent man to repair it." Citing 1 Thompson on Negligence, pp. 346 and 347. No case is cited like the one at bar; but the principles upon which cases of this character have been decided sustain the verdict.

TELEGRAPH COMPANIES—ACCEPTANCE OF FRANCHISE FROM UNITED STATES—POWER OF STATE TO TAX.—Rev. St. U. S. tit. 65, provides that any telegraph company, by filing its written acceptance, may construct and operate lines over any portion of the public domain, across any navigable water, and along any of the military or post roads of the United States; that the United States shall have priority in sending telegrams between the departments of government, its officers and agents, at rates to be fixed by the postmaster-general; that after five years the United States may purchase such lines for postal and military purposes at an appraised value. It was held by the Supreme Court of California, in City v. Western Union Tel. Co., 31 Pac. Rep. 10, that a telegraph company, by filing such acceptance, acquired national franchises which no State could tax. A lengthy and exhaustive opinion was rendered by McFarland, J., in which he reviewed and distinguished the case of Telegraph Co. v. Attorney-General, 125 U. S. 530, 8 S. C. Rep. 961.

BANKS—SPECIAL DEPOSIT—GRATUITOUS BAILMENT.—In Merchants' Nat. Bank v. Guilmartin, 15 S. E. Rep. 831, the Supreme Court of Georgia decide that the essence of a contract of bailment is diligence, and when the bailee shows the exercise of that degree of diligence required by law of his class he is discharged, although the thing bailed be stolen or lost. For a special deposit, received by a bank through its cashier for gratuitous safekeeping and return to the depositor on demand, the bank is not liable if the cashier, without its knowledge or consent, steals it or fraudulently appropriates it to his own use, provided the bank has exercised due diligence in selecting the cashier, and in not keeping him in office after it knew or ought to have known that he was or had become untrustworthy. In stealing or clandestinely appropriating the deposit to his own use, the cashier would not be acting in the bank's business or within the scope of his employment; he would be representing himself and not the bank. The Code, §§ 2201, 2961, does not vary this rule in respect to gratuitous bailments, inasmuch as the degree of diligence touching such bailments is no higher under the Code than at common law. Lumpkin, J., says:

The main question raised in the record is whether a bank, which, through the cashier, received from one of its customers a special deposit of valuable securities, to be kept simply for the depositor's accommodation, and returned to him on demand, shall be held liable for the felonious appropriation of the securities by the cashier to his own use, he taking them while they were in the bank. The answer to this question depends on the nature of the duty assumed by the bank with respect to the deposit. Such a deposit belongs to the class of bailments termed "gratuitous," and the test of the bailee's liability on a loss of the property is to inquire whether he exercised the full amount of diligence which the law exacts as the measure of his duty in keeping the property. Each kind of bailment imposes on the bailee the obligation to use a degree of care commensurate to some extent with his interest in the transaction. If the bailment is for the benefit exclusively of the bailee, he must use extraordinary care; if for the mutual benefit of the parties, ordinary care; and if for the exclusive benefit of the bailor, slight care will suffice. Thus, the essence of a contract of bailment on the part of the bailee is for diligence of the required degree, and when he has used such diligence his contract is performed, and he discharged, although the property may be lost during his custody of it. Accordingly we find the authorities holding that the bank is not liable for a loss of a special deposit, to keep which it receives no compensation, by the theft of its cashier or other servant, provided it has not been guilty of gross negligence in any respect. Foster v. Bank, 17 Mass. 479; Scott v. Bank, 72 Pa. St. 471; Bank v. Rex, 89 Pa. St. 308; Giblin v. McMullen, L. R. 2 P. C. 317; Edw. Bailm. § 45; Schouler, Bailm. § 42 *et seq.*; 2 Add. Cont. § 804; Bolles, Banks, § 6 *et seq.*; Morse, Banks, §§ 102*e*, 201. The bank may be guilty of negligence, and liable accordingly, in employing or retaining an unfit person in the position of cashier. But when it does its full duty in selecting a proper person, and in not disregarding indications of dishonesty which ought to arouse suspicion and investigation, then it is not responsible to one who has obtained from it the favor of barely keeping specific property without recompense, though the cashier steal the property so put in his charge. The law, as disclosed by the authorities, seems to consider that, in the case of a gratuitous special deposit, there is consideration enough in the bare custody of the property to insure its being kept without gross negligence, but not enough to bind the bank as an absolute insurer of its servant's honesty. The depositor contemplates, of course, and consents, that the cashier or some other agent is to be the personal guardian of the deposit. If the bank has selected and continues him in office, with due regard to the immense interests confided to him, his defalcation is a risk assumed by such a depositor. The bank, being equally liable to suffer by the same kind of misfeasance, thus evinces *prima facie* its good faith in having the wrong-doer in its service. As far as the question of mere negligence is concerned, the bank can plead its not knowing or having cause to suspect the integrity of its officer.

But it has been strongly urged that the bank, as master, is liable for the fraud of the cashier, its servant, in the course of its business. This is the point of most difficulty. Every bailee is bound to exercise good faith, and abstain from fraud, in keeping the property. Bad faith is at least as bad as gross negligence, and entails as much liability. The application of this is easy where the very person to whom the property was intrusted is guilty of the fraud. But

suppose the master, being the bailee, is personally blameless, and his servant is the guilty one, shall the master be held liable? At common law there was once some authority that the master was not liable for the unauthorized willful tort, which of course included fraud, of his servant. But the better view is that the master is liable for every tort by the servant which is within his authority, or is committed in the prosecution and within the scope of the business. It is often hard to draw the line between torts within and torts without the master's business. On the question now to be decided the cases hold that the act of the cashier, by which he appropriates exclusively to himself a gratuitous special deposit in the bank, is not an act done in the bank's business, and within the scope of his employment. The custody of the deposit implies no act to be done, but only a mere continuance of possession until a return of the property is demanded. The cashier had nothing to do about it except suffer it to remain in a safe place of deposit. Consequently, in taking it to himself, he is said to "step aside" from his employment to do an act for his personal gain, regardless of the business for which he was engaged. Such an act is lacking both in the rendition of, and in the intent to render, any service to the employer. The cashier does not, as a matter of fact, act with the bank's authority, and, furthermore, does not essay, or even profess, to act in its behalf. He represents nobody but himself. He throws off all allegiance to his master, and takes the part of a common enemy to all concerned. He becomes the same as a stranger from without, who by robbery, burglary, or stealth deprives the bank of a special deposit; and the authorities hold that the bank is not chargeable with such a loss, in the absence of gross negligence, but is liable if grossly negligent. Griffith v. Zipperwick, 28 Ohio St. 388; Hale v. Rawallie, 8 Kan. 136; Levy v. Pike, 25 La. Ann. 630; Bank v. Graham, 79 Pa. St. 106, 100 U. S. 699; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y. 278; Wylie v. Bank, 119 U. S. 361, 7 Sup. Ct. Rep. 268; Whitney v. Bank, 55 Vt. 155; Schermer v. Neurath, 54 Md. 491. Such a fraud, by a well selected servant, duly supervised, is not to be imputed to the bank as its own fraud. The bank cannot be said to have stolen when there is on its own part no participation in the theft, no appropriation, and no intent to appropriate the property. Of course, if the bank derive profit or benefit from its servant's speculation, it is liable. Society v. Underwood, 9 Bush, 609; Bank v. Dunbar, 118 Ill. 625, 9 N. E. Rep. 186. No case has been found which holds the bank liable because the defaulting cashier was acting in the prosecution and within the scope of the bank's business when he appropriated the deposit, but such liability, when affirmed, is rested specifically upon the existence of gross negligence. Pattison v. Bank, 80 N. Y. 82; Preston v. Prather, 137 U. S. 604, 11 Sup. Ct. Rep. 162. The common law appears to be that a master generally is not liable for the servant's fraud or willful tort unless he is acting at the time by the master's express authority or in the conduct of his business; that is to say, at his actual or implied instance. The servant must, in the wrongful act, be acting or intending to act in behalf of the master, and in the course of his employment. Pol. Torts, pp. 55, 61; Cooley, Torts, p. 627 *et seq.*, 754; Evans, Prin. & Ag. 558, 559; 1 Bigelow, Frauds, 225; Fras. Mast. & Serv. 280; 45 Alb. Law J. 530; Barwick v. Bank, L. R. 2 Exch. 259; Hubbersty v. Ward, 8 Exch. 330; Grant v. Norway, 10 C. B. 665; Coleman v. Riches, 16 C. B. 105; Erb v. Railway Co., 5 Can. Sup. Ct. 179, 194; Banking Co. v. Charnwood, 18 Q. B. Div. 714; Howe v. Newmarch, 12 Allen, 49; Mott v. Ice Co., 73 N. Y. 543; Robinson v. Bealle, 20 Ga. 275, 308, 309.

INSOLVENT PARTNER—DISTRIBUTION OF ASSETS BETWEEN INDIVIDUAL AND PARTNERSHIP CREDITORS.

Individual assets for individual creditors, and partnership assets for partnership creditors, is a rule of law now so well established in both law and equity courts, that it is not pertinent to go into the discussion whether it had its origin in equity (which is supposed to mete out justice), or whether it is a rule established for convenience, and being as near equitable as any rule could be. The fact probably is, that it owes its establishment as a rule to both of these sources. Like all general rules, however, it is in its universal application that the difficulty is experienced. Where there are partnership assets and individual assets, and partnership creditors and individual creditors, all easily distinguishable, no difficulty may be experienced. But where this is not so, as where there are two classes of creditors and but one of assets, or *vice versa*, or where one partner is insolvent and the other is not, or where one has sold out to the other, the continuing partner assuming the payment of the debts, much difficulty has been experienced in the application of the rule.

The case of Brock v. Bateman[1] presents one of these odd and difficult questions. A. J. Brock and Marion Slaughter were partners, dealing in hogs and cattle, and the firm as well as both partners became insolvent. Each of the partners and also the firm made a general assignment for the benefit of creditors. The assets of the firm amounted to $6.35, a sum insufficient to pay the costs of administering the trust. The assets of A. J. Brock amounted to $27,241.18, and there was also a large amount of assets of Slaughter in the hands or to come into the hands of his said assignee. There were numerous creditors of each of the partners and also of the firm. In this case it was decided that, practically, there was no partnership fund or assets, and the partnership creditors were entitled to share equally with the individual

[1] 29 Ohio St. 609.

creditors of A. J. Brock in his individual assets, and also equally with the individual creditors of Marion Slaughter in his individual assets. The amount, however, that they should receive from each of said funds must not exceed the total amount of their claims. This was the holding of the lower court. The supreme court, in affirming this decree, say: "Nor do we see any error rendered by the court upon the final hearing. The creditors of the firm trusted both the partners, and had a valid claim against each for the full amount of the partnership debts; whereas, the individual creditor only truste ' one of them. It would seem, on natural principles of justice, therefore, that the assets ought to be so marshalled in such cases as to give some preference to the partnership creditors over those of the individual members of the firm. The authorities on the subject are not uniform. It seems to us, however, that the better authorities, both English and American, as well as reason, establish the justice of the rule adopted by the court below. In other words, equity will apply the assets of an insolvent partnership in payment of the creditors of the firm, to the exclusion of creditors of its individual members; and if there be no partnership assets for distribution, as was the case here, the creditors of the firm to share equally with the creditors of each individual member of the firm in the *pro rata* distribution of his assets. Of course, the aggregate amount so distributed to the creditors of the firm must not, in any case, exceed the amount of their claims. It is true that this rule may work hardship and apparent injustice in particular cases; so, it is believed, will any general rule that can be devised." This decision seems rather odd at the first consideration. Here, it would seem, that by reason of there being no partnership assets, the partnership creditors were in a better condition than they would have been had there been such a fund. The logic of this is, that if there is a fund arising from partnership assets making a dividend of five per cent., the partnership creditor cannot participate equally with the individual creditor in the fund arising from his individual property. If there is no fund arising from the partnership assets, the partnership creditor can share with the individual creditor of each partner. In a great many instances it is easily seen that a partnership creditor, where there are individual assets, is more fortunate if there be no partnership assets than if there were partnership assets. Where one partner sells his interest to the other partner, and this latter partner makes an assignment, having on hand at the time such assignment is made a large amount of the goods of the former partnership, as well as other property, how are the creditors of the firm and his individual creditors to share in the assets arising from the firm property? Are the firm creditors entitled to be first paid out of the fund arising from the sale of the firm property? Or are the firm creditors entitled to share equally with the individual creditors in the fund arising from both the former firm property and the former individual property? Or are the individual creditors entitled to a preference in all this property? At the first blush it would seem that in equity and justice the fund arising from the sale of the partnership property ought to be distributed to those creditors who helped to create it, that is, to the partnership creditors. Especially would this seem true where the fund is clearly distinguishable from that arising from his individual assets. It is, however, a conceded right that the firm could have sold these goods to a third person, and of course free from all claims of their creditors. If a firm sells everything it has, leaving nothing in the firm or owning nothing as individuals, the creditors are simply holding worthless claims. If the firm has a right to thus sell the property and deprive their creditors of it as a security for their debts, equally well may the same be done by a sale of one partner to another. The only way in which a preference may be preserved to the partnership creditors is by some special contract or reservation made in the sale. It is a well-settled principle of law that the creditor has no other or better right to have the assets applied to his debt than the retiring partner has to have it so applied; and whatever rights he has in the matter must be worked out through such retiring partner. As long as a partnership continues, it is the right of any partner to have the firm assets applied to the firm debts. But when a partner retires from a firm, selling his interest to the continuing partner, he loses this right, and becomes a mere unsecured creditor for whatever may be

or become due him, and like any other creditor of the continuing partner, has only the personal security of such continuing partner to look to for payment of any expense or liability he may incur by reason of such partnership. This right of a partner to have the partnership assets applied to the partnership debts, results from his liabilty for the same. And while the partnership still exists, such right of application of the assets follows as an incident of the partnership itself. But when the partnership is dissolved, it can only exist by virtue of a contract to that effect. And the mere fact that the continuing partner, who buys the interest, assumes the debts and agrees with the retiring partner to indemnify or save him harmless, or to pay the debts, does not preserve this right. It has been held that the contract in such cases is only a personal obligation, and is equivalent merely to deferring the payment of the consideration. The early leading case maintaining this view is that of Howe v. Lawrence.[2] The facts in this case appeared as follows: On the first day of January, 1850, Henry D. Shaw and William W. Gardner formed a copartnership in trade, under the firm name of Shaw & Gardner. On the 24th day of January, 1851, the parties being mutually dissatisfied, the firm was dissolved, and Shaw conveyed all his interest in the partnership property to Gardner, he agreeing in consideration therefor to pay all the partnership debts. The firm and both partners were at the time insolvent, although there was not sufficient evidence to warrant the belief that either partner knew it. Immediately after the dissolution, Gardner informed the creditors of the firm that he should continue the business, and had agreed to pay all the debts of Shaw and Gardner. He continued the business a few weeks, and in that time added a few hundred dollars to his stock. On the 27th of February, 1851, Gardner was declared insolvent, and his whole stock, a greater portion of which was the identical property formerly owned by Shaw and Gardner, passed into the hands of the assignee. The assignee realized from the sale of the same $1,670.39. The claims against the former firm were $5,050, and his private debts were $850. Bigelow, J., in rendering the opinion, says: "Upon the facts reported by the master in the case, two questions arise. The first is, whether the property, which belonged to the partnership of Shaw & Gardner, and which upon the dissolution of the partnership of the 24th of January, 1851, was sold and transferred by Shaw to Gardner, is to be treated as the separate estate of Gardner, and to be appropriated as such to the payment of his separate debts; or whether, notwithstanding the sale and transfer by one partner to the other, it is still to be regarded as joint estate and to be applied to the payment of the partnership debts accordingly. The right of copartners upon dissolution to transfer the joint property to one of the firm is clear and unquestionable. The effect of such transfer as between the partners is to vest the legal title to the property, with a right to use and dispose of it as his separate estate. It would seem to follow as a necessary consequence, that the creditors of the firm, after such conveyance, would have no right to look to the property transferred as joint property upon which they had any special claim or lien. If in such transfer there is no fraud and collusion between the partners for the purpose of defeating the rights of the joint creditors, and the transaction is made in good faith, upon dissolution, and for the purpose of closing the affairs of the partnership, the joint property thereby becomes separate estate with all the rights and incidents, both in law and equity, which properly attach thereto." * * * The partners have a right to transfer them for a valuable consideration to each other or to a stranger. The only limitation upon this right is, that it shall be exercised *bona fide*, and without any intent to defraud the creditors of the firm or deprive them of their legal or equitable claims upon the joint estate in case of insolvency. * * * If the transfer has been made honestly and for a valuable consideration, the property has thereby become separate estate, free from any claims of the joint creditors. * * * The application of these principles to the present case is decisive against the right of the joint creditors to require the property transferred by Shaw to Gardner to be appropriated primarily to the payment of the debts of the firm. *Prima facie* it is the separate estate of Gardner, and the burden is upon the peti-

[2] 9 Cush. 553, 57 Am. Dec. 68, decided by the Supreme Court of Massachusetts in 1852.

tioning creditors to show that it was conveyed to him *mala fide* and in fraud of the rights of creditors. * * * It is not to be inferred, however, that any conveyance of joint property to a co-partner, made with a knowledge of the firm's insolvency, and with intent to deprive the creditors of its proper application to the payment of the joint debts, would defeat the right of the joint creditors, in proceeding in insolvency, to follow the partnership effects and have them appropriated to the payment of the debts of the firm. Such a conveyance would be a fraud of the law and equity, and would at once be set aside."

As to the right of the partnership creditors to this fund through the lien of the retiring partner therein, the court continues: "It was urged by the counsel for the petitioners, that as copartners have a lien upon the partnership effects for the discharge of all the debts of the firm, even after dissolution, this lien might be made available in the present case for the benefit of the joint creditors; and that in this way the equities of the creditors might be worked out through the medium of that of the retiring copartners. It is undoubtedly true, in the absence of any special agreement between copartners as to the application of the partnership effects after dissolution, that a retiring partner retains a lien upon them to the extent of enforcing their application to the payment of the joint debts, and the creditors, though they have no lien on the property in their own right, are allowed in equity to assert a *quasi*-lien by administering the equities between the partners themselves. But it is equally well settled that a retiring partner may relinquish this lien, in which case he has no equity through which the creditors of the firm can work out their own. By the transfer of the joint property to his copartner, and taking his personal contract and security for the payment of the joint debts, he discharges his lien and substitutes therefor the agreement of his copartner, to which he can look alone for his remedy, in case he is called on to pay the debts of the firm. There is no duty left on the property, but only a personal obligation by one partner to pay the joint debts. The creditors in such case cannot rest upon the equity of the outgoing partner. The transfer in the present case falls within this principle. Shaw, the retiring partner, relinquished all his right to the property of the firm in consideration of a promise by Gardner to pay all the debts of the firm. Shaw, therefore, has no lien which can be enforced for the benefit of the joint creditors upon the partnership effects. The property was transferred absolutely, discharged from any lien or trust which would have attached to it in the absence of any special agreement between the parties respecting it."[3]

On the other question, in Howe v. Laurence,[4] as to the right of the partnership creditors to prove their claims against the separate estate of Gardner, and take dividends therein equally with the separate or individual creditors, the court held they could not so share, because such right was not recognized by the statutes of that State. This is in conflict with the case of Brock v. Bateman, above herein referred to. In the recent case of Hanford v. Prouty,[5] it was said: "The equitable rule which requires the assets of the firm to be first applied to the payment of the firm debts, and the individual assets to the individual debts of the partners, is founded, not upon the equities of the creditors, but upon the equities of the partners. Each member of the firm has an equitable right to have partnership assets applied in the first instance to the satisfaction of partnership debts, so that his individual property may, so far as is possible, be relieved from the burden of firm indebtedness. So, the members of the firm have each an equitable right to have the individual property of each partner first exhausted in satisfying his individual debts, so as to exempt the joint estate, so far as possible, from seizure for individual debts. But firm creditors, whose debts have not been reduced to judgment, have no specific lien, either legal or equitable,

[3] This decision is supported by a large number of adjudicated cases: Robb v. Mudge, 14 Gray, 534; Ladd v. Griswold, 9 Ill. 25; Hapgood v. Cornwell, 48 Ill. 64; Goembel v. Arnett, 100 Ill. 34; Trentman v. Swarzwell, 85 Ind. 443; City of Maquoketas v. Willey, 35 Iowa, 323; Fulton v. Hughes, 63 Miss. 61; Armstrong v. Fahnstock, 19 Md. 58; Vasper v. Kramer, 31 N. J. Eq. 420; West v. Chasten, 12 Fla. 315; Miller v. Estill, 5 Ohio St. 508; White v. Parish, 20 Tex. 688; Clarke's Appeal, 107 Pa. 436; Allen v. Griesom, 90 N. Car. 90; Hollis v. Staley, 3 Baxter, 167; Parks v. Comstock, 59 Barb. 16; Emerson v. Parsons, 46 N. Y. 560; Menagh v. Whitnell, 52 N. Y. 683; Linger v. Simpson, 1 Stim. & Stu. 600.

[4] 9 Cush. 559.

[5] Illinois, 1890, 24 N. E. Rep.

upon the property of either the firm or of the individual partners; and their right to have the firm assets so marshaled as to satisfy their debts first can only be worked out through the equities of the partners.[6] It follows that a sale made in good faith by one partner to his copartner or to a third person, of all his interest in the firm, is as valid a transfer of the entire property to the vendee as is a sale between any individuals, although the buyer and seller are insolvent, and thus defeat their creditors; and as the firm creditors have no lien, the buyer can dispose of the property as his own, and pay his separate creditors to the exclusion of joint creditors, or *vice versa*."[7]

The recent case of Darby v. Gilligan[8] seems to limit this right of one partner to sell to his copartner, and thereby convert the joint property into separate property, and thus exclude the partnership creditors, to cases where the firm is solvent, and a good and sufficient consideration passes. The court says: "On the other hand, according to the better reason and the weight of authority, if the firm is insolvent, or on the eve of insolvency, and both the partners are insolvent, a purchase by one partner of the interest of the other, in consideration of the former's assumption of all the debts of the firm, will be regarded as a purchase upon a consideration which is of no value whatever; and no equivalent having been given, the transaction is in effect voluntary, and its only effect, if sustained, would be to hinder partnership creditors, and hence is deemed ineffectual to convert the joint property into separate property as against the firm creditors."[9]

The case of Olson v. Morrison,[10] seems to be *sui generis*. Here it is held that: "One who has purchased of one of a firm, property subject to partnership debts, and has agreed in writing to assume and pay such debts as part of the purchase price, thereby recognizes the equitable lien of the partnership creditors: and it is not necessary that such creditors should put their claims in judgment before filing a bill to compel such payment. The creditors of the partnership are entitled to a common relief under such a contract, and may properly unite in a suit to obtain it." The action was brought by Andrew Olson and the creditors of Olson & Jones, to compel the defendants to pay to such creditors the amount of their claims, and to have the same declared to be an equitable lien upon certain property purchased by the defendant Morrison of said Olson, and formerly belonging to the firm of Olson & Jones, and to enjoin them from conveying or incumbring the property. An injunction was granted.

Deveau v. Fowler[11] is another case which seems to stand alone. This was an action to dissolve an injunction, for the want of equity

[6] *Ex parte* Ruffin, 6 Ves. 119; *Ex parte* Williams, 11 Ves. 3; Huiskamp v. Wagon Co., 121 U. S. 311; Fitzpatrick v. Flannahan, 106 U. S. 648; Pase v. Beauregard, 99 U. S. 119; Waterman v. Hunt, 2 R. I. 298; Shackelford v. Shackelford, 32 Gratt. 481; Coakley v. Weil, 47 Md. 277; Upson v. Arnold, 19 Ga. 190; 1 Bates on Part. 559, and authorities there cited.

[7] See also Siskman v. Abernathy, 23 Pac. Rep. 447, 19 Col. 1890, and numerous authorities cited in opinion.

[8] 10 S. E. Rep. 400, 33 W. Va. 246 (1890).

[9] *Ex parte* Mayon, 4 De Gex, J. & S. 664, 11 Jur. (N. S.) 433, 12 L. T. (N. S.) 254; Sanderson v. Stockdale, 11 Md. 563; Phelps v. McNeely, 66 Mo. 554; Tenney v. Johnson, 43 N. H. 144; Marsh v. Bennett, 5 McLean, 117; Roop v. Herron, 15 Neb. 73, 17 N. W. Rep. 353; *In re* Cook, 3 Biss. 122; Conroy v. Woods, 13 Cal. 626; Ransom v. Van Deventer, 41 Barb. 307; Menagh v. Whitwell, 52 N. Y. 146, 163; Bank v. Smith, 26 W. Va. 541. An examination of some of these cited authorities is interesting, but nothing more can here be given than the *syllabi* of some. *In re* Cook, 3 Biss. 122: "When partners are in fact insolvent, they should be considered in equity as holding the partnership effects in trust for the benefit of the firm creditors, and cannot, by the transfer of the interest of one to the other, defeat the trust. A sale by one partner to his copartner, when the firm is insolvent and on the eve of bankruptcy, is presumptively fraudulent as to the firm creditors, and the court should set it aside and distribute the proceeds as firm property." Roop v. Herron, 15 Neb. 73, 17 N. W. Rep. 353: "When the firm is insolvent, the partnership property will be applied to the payment of the partnership debts, and an individual creditor of one of the partners is not entitled to be paid out of such property in preference to partnership creditors. A transfer of the interest of a partner of an insolvent firm to his copartner does not enable the assignee, as against the creditors of the firm, to apply the partnership property to the payment of the individual debts." Conroy v. Woods, 13 Cal. 626: "The lien of the firm creditors is paramount to the lien of individual creditors. And where one partner buys his copartner's interest, agreeing to pay the debts of the firm, the partnership property remains bound for firm debts just as before the sale. . . . Partners may make a *bona fide* sale of their property any time before their creditors acquire a lien; but such sale cannot include a sale directly or individually to one of the partners, with a stipulation that he will pay the firm debts, there having been no credit given by the individual creditor on the strength of an apparent sole ownership of the vendee."

[10] 29 Mich. 395.

[11] 2 Paige, 400.

appearing on the face of the petition. The parties were copartners in the boot and shoe business. On the dissolution of the partnership, it was agreed that the defendant should take all the stock and effects and pay off all the debts due by the firm and indemnify the retiring partner against the same. The petition alleged that the defendant was insolvent, and that he threatened to dispose of all the partnership property and appropriate the same to his own individual use, leaving the debts unpaid. The plaintiff prayed for an injunction and receiver, and that the property and effects which formerly belonged to the firm might be applied to the payment of the partnership debts. The injunction was granted in the lower court, and Chancellor Walworth refused to dissolve it.

The reader will first need to consult the decisions of his own State before he will be safe in applying any rule for the distribution of the assets of an insolvent partner. No doubt, if the outgoing partner specially stipulates that the partnership assets shall be applied to the payment of the partnership debts, that he thereby retains his equitable lien on such assets, and he can compel their application to the payment of the partnership debts. Or the creditors may prove their claims to the assignee of the insolvent and continuing partner, and will then be entitled to a preference in the funds arising from the former partnership property over the individual creditors of such partner.[12] Where the question is an open one, or the deciding court is not bound by precedent, a just and equitable rule would seem to be, that where one partner sells out to his copartner, and they are both insolvent in fact at the time, irrespective of whether they knew or ought to have known it, and such continuing partner makes an assignment, before the partnership property is disposed of by him, that the fund arising from such partnership property ought first be applied to the partnership creditors in preference to the individual creditors of such continuing partner.

Springfield, Ohio. WM. M. ROCKEL.

[12] Page v. Hornby, 25 Beav. 280; Kelsey v. Hobley, 16 Pet. 269; Harmon v. Clark, 13 Gray, 114; Talbot v. Pierce, 14 B. Mon. 158; Marsh v. Bennett, 5 McLean. 117; Shackelford v. Shackelford, 32 Gratt. 481; Bates on Partnership, § 552.

[13] See upon kindred subjects: Central Law Journal, vol. 12, pp. 15, 350; vol. 18, pp. 409, 411; vol. 20, p. 7; vol. 25, p. 204; vol. 26, p. 166.

COMPETENCY OF WIFE AS WITNESS—BIGAMY.

PEOPLE V. QUANSTROM.

Supreme Court of Michigan, Oct. 4, 1892.

Bigamy on the part of a husband is not such a "personal" wrong or injury to the wife as to allow her to testify against the husband in a criminal prosecution, under 3 How. St. § 7546, forbidding her testimony except in cases growing out of such wrong or injury, and forbidding it also in any proceeding instituted by her in consequence of adultery.

MCGRATH, J.: Respondent was convicted of bigamy, and the sole question in the case is whether a complaint for bigamy may be made by the first wife. It is well established that one not a competent witness against the person charged is not competent to make a complaint against him, so that the real question is whether, in a criminal action for bigamy, the first wife is a competent witness. Our statute, as amended in 1885, is as follows: "Sec. 7546. A husband shall not be examined as a witness for or against his wife without her consent, nor a wife for or against her husband without his consent, except in cases where the cause of action grows out of a personal wrong or injury done by one to the other, *or grows out of the refusal or neglect to furnish the wife or children with suitable support, within the meaning of act number one hundred and thirty-six of the Session Laws of eighteen hundred and eighty-three*, and except in cases where the husband and wife shall be a party to the record in a suit, action, or proceeding where the title to the separate property of the husband or wife so called or offered as a witness, or where the title to property derived from, through, or under the husband or wife so called or offered as a witness, shall be the subject-matter in controversy or litigation in such suit, action, or proceeding, in opposition to the claim or interest of the other of said married persons, who is a party to the record in such suit, action, or proceeding; and in all such cases, such husband or wife who makes such claim of title, or under or from whom such title is derived, shall be as competent to testify in relation to said separate property and the title thereto, without the consent of said husband or wife who is a party to the record in such suit, action, or proceeding, as though such marriage relation did not exist; nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage, but in any action or proceeding instituted by the husband or wife, in consequence of adultery, the husband and wife shall not be competent to testify."

It is clear that the words "personal wrong or injury" are used in a restricted sense. Given their broadest signification there would be no necessity for the exceptions following that clause, and no necessity for the insertion of the italicised clause or amendment of 1885. To the general common-law rule excluding the testimony of

husband and wife, there were exceptions which were allowed, from the necessity of the case, "for the protection of the wife in her life and liberty, and partly for the sake of public justice." This necessity is described by Lord Mansfield to mean, "not a general necessity, as where no other witness can be had, but a particular necessity, as where, for instance, the wife would be otherwise exposed, without remedy, to personal injury or brutal treatment." Bentley v. Cooke, 3 Doug. (Mich.) 422. In 1 East, P. C. 455, Mr. East regards it as settled that "in all cases of personal injuries committed by the husband or wife against each other, the injured party is an admissible witness against the other." The text writers generally refer to the exceptions to the general rule of incompetency as embracing cases of personal injury. Whart. Crim. Ev. 393; 2 Tayl. Ev. § 1371. The instances given are where a man has been indicted for forcible abduction with intent to marry; for assisting at a rape; for attempting to poison; for maliciously shooting; or for an assault and battery. Mr. Taylor says: "For many years doubts were entertained whether a wife was or was not an admissible witness against her husband in cases where he was proceeded against, under the vagrant act, as a rogue and a vagabond for deserting her, and for causing her to become a charge to the parish. These doubts have now been resolved in the negative." 2 Tayl. Ev. § 1371. The amendment of 1885 to our own statute makes the wife a witness in proceedings for refusal to support. In People v. Carpenter, 9 Barb. 580, the husband was indicted for using criminal means—as subornation of perjury—to injure the wife in a proceeding for divorce, and the court held that there was no violence, no injury, no threat of injury, to her person, against which it was necessary to protect her; that she had abundant means of defense and redress in the judicial proceedings in which the fraud was practiced, and that she was therefore not a competent witness in the criminal proceeding. Citing People v. Chegaray, 18 Wend. 637; Den v. Johnson, 18 N. J. Law, 87; State v. Welch, 6 Me. 3. State v. Burlingham, 15 Me. 104. The language of the rule at common law was as broad as the language "personal injury" in our statute, and that language meant, and was held to mean, violence, either actual or constructive, to the person, and by a long line of decisions the wife was not allowed to give testimony in prosecutions for bigamy, or any other crime not involving personal violence or corporeal injury to her. The words "wrong" and "injury" are often used the one for the other. An injury to the person is a wrong, and a constructive injury to the person is also a wrong. A wrong is defined to be an injury, and an injury as a wrong. A personal wrong or injury is an invasion of a personal right; it pertains to the person, the individual. A cause of action growing out of a personal wrong is one designed to protect or secure some individual right. The right, as well as the wrong, must pertain to the person. It must be one that is purely personal in its character, and in no sense can the exception here be said to embrace public wrongs, which are personal only in the sense that they wound the feelings or annoy or humiliate, but inflict no injury upon the person. The last clause of the section was evidently added in view of the fact that, under another statute, the proceeding for adultery cannot be instituted except by the wife, and is therefore of a personal character.

Our statute is peculiar, and we have been unable to discover any adjudications upon a like statute. It is anomalous, also, in that it imbraces within one section the law governing the admissibility of the testimony of husband or wife in criminal proceedings, as well as civil cases. The authorities in those States where the question has arisen under statutes which, although they differ, involve the same principle, are in conflict. In Iowa the statute provides that neither the husband nor wife shall be a witness against the other, except in a criminal proceeding for crime committed by one against the other. In State v. Sloan, 55 Iowa. 219, 7 N. W. Rep. 516, the court say simply that "in our opinion, if the defendant is guilty of bigamy, he committed a crime against the wife." State v. Hughes, 58 Iowa, 165, 11 N. W. Rep. 706, follows the Sloan Case, but in neither opinion is the question discussed. In Nebraska, under a similar statute, in Lord v. State, 17 Neb. 526, 23 N. W. Rep. 507, the husband was convicted of adultery. The court say: "The statute makes it an offense for the husband to desert his wife, and live and cohabit with another woman. If the husband is prosecuted for the offense, the prosecution certainly would be a criminal proceeding for a crime committed against the wife. In our own view, it was the intention of the legislature to include the offense here charged; and the ends of justice will be best subserved by permitting the wife to testify." In Overton v. State, 43 Tex. 616, the husband and wife had been separated, and the husband was charged with the theft of the wife's property. The statute is the same as that of Iowa. The court say: "This provision of the Code cannot, in our opinion, be properly given so broad an interpretation as to permit husbands and wives to testify against each other in prosecutions for offenses against their property. To give it such a construction would be to make a marked innovation upon a well-established common-law rule of evidence not required or warranted by its language. There is nothing, we think, in the spirit and object for which this provision of the Code was evidently designed, which requires or should induce us to give it this interpretation. Its plain and obvious import is to limit the permission given to the husband and wife to testify against each other to prosecutions for personal offenses by one against the other." In Compton v. State, 13 Tex. App. 271, the indictment charged the husband with incest with

the daughter of his wife by a former husband. The court overrules Morrill v. State, 5 Tex. App. 447, and Roland v. State, 9 Tex. App. 277, and holds that the wife is not a competent witness against her husband. In State v. Armstrong, 4 Minn. 335 (Gil. 251), the court say: "A prosecution for the crime of adultery does not fall within the cases in which a wife could testify against her husband under the general rule, for two reasons: First. The necessity which warrants the exception does not exist, as all the material feature of such an offense are susceptible of proof without her aid as readily as in other crimes. Second. It is not a crime against her person, and involves no violence to or abuse of her.

In New York the statute provided that, in all criminal trials and examinations before trial, a husband or wife may be examined as a witness in behalf of the other, but upon no such trial or examination shall a husband or wife be compelled to testify against the other. In People v. Houghton, 24 Hun, 501, the court held that the latter clause was negative only, and made no innovation upon the old common-law rule; that the statute affirmed her incompetency only in favor of her husband, and not against him. In Utah, the Code of Civil Proceedure provided that the exception did not apply to a criminal action or proceeding for a crime committed by one against the other. The Code of Criminal Procedure provided that, except with the consent of both, or in cases of criminal violence upon one by the other, neither husband nor wife is a competent witness for or against each other in a criminal action or proceeding to which one or both are parties. In Bassett v. U. S., 137 U. S. 496, 11 Sup. Ct. Rep. 165, which was a prosecution for polygamy upon error of the Supreme Court of Utah, reported in 13 Pac. Rep. 237, the court held that the testimony of the wife was inadmissible. Justice Brewer, speaking for the court, says: "Is polygamy such a crime against the wife? That it is no wrong upon her person is conceded; and the common-law exception to the silence upon the lips of husband and wife was only broken, as we have noticed, in cases of assault of one upon the other. That it is humiliation and outrage to her is evident. If that is the test, what limit is imposed? Is the wife not humiliated, is not her respect and love for her husband outraged and betrayed, when he forgets his integrity as a man, and violates any human or divine enactment? Is she less sensitive, is she less humiliated, when he commits murder or robbery or forgery, than when he commits polygamy or adultery? A true wife feels keenly any wrong of her husband, and her loyalty and reverence are wounded and humiliated by such conduct. But the question presented by this statute is not how much she feels or suffers, but whether the crime is one against her. Polygamy and adultery may be crimes which involve disloyalty to the marital relation, but they are rather crimes against such relation than against the wife; and, as the statute speaks of crimes against her, it is simply an affirmation of the old, familiar, and just common-law rule."

In the cases excluding the testimony of the wife, it is held that the legislature had imported into the statute the common-law rule, and that, before any departure from that rule—affirmed, as it is, through the ages of common-law; a rule having its solid foundation, as is said by Justice Brewer, in the best interests of society—can be adjudged, the language declaring the legislative will should be so clear as to prevent doubt as to its intent and limit. The clear weight of authority supports the principles laid down in these last-cited cases, and is against the admissibility of the testimony. If not a crime against her, it certainly is not a wrong which is personal to her. Criminal statutes are not grounded in personal grievances, but in public injuries, and a prosecution for bigamy is not a cause of action growing out of a personal wrong or injury. The conviction must therefore be set aside, and the respondent discharged.

NOTE.—At common law, with certain exceptions hereafter to be noted, husband and wife could not testify as witnesses in courts of justice, the one for or against the other, in any legal proceeding in which the other was a party, or which involved the other's pecuniary interests or criminal responsibility. The reason of the rule was that husband and wife were one, and as no one could testify for or against himself, neither could the wife testify for or against him. And to allow one to testify for the other, would be to put him or her under a great temptation to commit perjury, and would also endanger the harmony and confidence of the marriage relation.

The above propositions of law are too well known to need citation of authorities. The rule, however, did not apply to parties living together but not married. 1 Greenleaf on Evidence, 339. And even when divorced, they could not testify against each other as to matters occurring during the marriage. Dickerman v. Graves, 6 Cush. 308, 53 Am. Dec. 43; Reeves v. Herr, 59 Ill. 83; Rea v. Tucker, 51 Ill. 110. The common law rule applied equally to the husband and the wife, and in the main to both civil and criminal cases, and could not be waived by the consent of the parties, as it was a rule of public policy. Turpin v. State, 55 Md. 477; Stein v. Bowman, 13 Pet. (U. S.) 223; Turner v. State, 50 Miss. 351; Jordan v. Henderson, 19 Iowa, 365.

The exceptions referred to were as follows: Husband and wife could testify for or against each other in prosecutions of the one for criminal injury to the other (Stein v. Bowman, *supra;* Goodwin v. State, 60 Ga. 509; State v. Parrott, 79 N. Car. 615), as for assault and battery (Whipp v. State, 34 Ohio St. 87), shooting and forcible abduction. 9 Am. & Eng. Ency. of Law, 807. Husband and wife could also make criminal complaints against each other, and in the prosecution testify to personal injuries received. State v. Dyer, 59 Me. 303; State v. Bennett, 31 Iowa, 24; Matthews v. State, 32 Tex. 117; Goodrum v. State, 60 Ga. 509. The rule that the wife shall not testify against the husband is founded upon their legal unity and the policy of preventing discord between them, and is not applicable to actions at law in which the husband and wife have conflicting interests and are opposing parties, as in divorce actions, suits by the wife seeking protection

against her husband, or suits in equity relating to the wife's separate estate. Spitz's Appeal, 56 Conn. 184; 2 Lawson's Rights, Remedies and Practice, 13, 14. Modern statutes have, as a rule, rendered husbands and wives competent and compellable witnesses for each other, except in criminal cases and in cases of adultery. And a statute enabling the parties litigant to any suits, and their husbands and wives, to testify, does not change the common law rule in criminal suits. Turpin v. State, 55 Md. 462; Wilke v. People, 53 N. Y. 525; Steen v. State, 20 Ohio St. 333.

The question involved in the principal case seems to be somewhat in doubt, there being authorities on both sides of the question; the value of the authorities, however, depending in each case upon the wording of the statute construed. Two of the judges of the court dissent from the conclusion in the principal case, basing their dissent upon the Iowa and Nebraska cases noted in the opinion of the majority. They also claim that under the Michigan statute it is plain that adultery in husband or wife is treated as a crime against the other, as it is provided that no prosecution shall be commenced but on the complaint of the husband or wife, and that if the statute read "wrong or injury," without the prefix "personal," there could be no doubt of its intention; for all must admit that bigamy, although a crime against society, is a great wrong and injury to the lawful wife, and the consequences of the crime fall most heavily upon her and the second and unlawful wife. They say that if the word "personal" is restricted to the narrow sense of a beating or wounding of the person, the act of bigamy may possibly be excluded from the meaning of the statute, but they cannot conceive from its reading that it is susceptible of so narrow an interpretation. It is the wife's personal rights, whether of person or property, that are intended to be protected by her testimony. Such a violation as this of her marital rights, the most sacred and dear to her of any, is certainly a personal wrong and injury to her.

The dissenting judges could not believe that while a wife or husband may make complaint against the other for adultery, they cannot do so in bigamy, which embraces adultery. In addition to the cases cited in the opinion of the court, the following late cases bear somewhat upon the questions presented: On an indictment for bigamy, the second wife is admissible as a witness either for or against the prisoner. State v. Patterson (N. Car.), 38 Am. Dec. 699. Under a statute permitting the husband and wife to testify against one another on a criminal prosecution for an offense committed by one against the other, the one may testify against the other on an indictment of the other for adultery. Roland v. State (Tex.), 35 Am. Rep. 743. Under Civil Code Utah, § 1156, permitting a husband or wife to testify in a criminal action or proceeding for a crime committed by one against the other, the legal wife is competent to testify against her husband before the grand jury which found an indictment against him for polygamy. United States v. Cutler (Utah), 19 Pac. Rep. 145. In Alabama the wife of the defendant in a criminal prosecution is not a competent witness for him. Hussey v. State, 87 Ala. 121. In Tennessee the wife is not a competent witness for her husband in criminal cases, the common law rule not having been changed by statute. Owen v. State (Tenn.), 16 S. W. Rep. 114. In a prosecution of a man for bigamy, the woman whom he was charged with having lawfully married having testified that she was defendant's wife, there was no error in allowing the State to ask her if she was not the person defendant married at a certain time, so as to show in connection with evidence that he was at that time already married, that she was not incompetent to testify against him. Salter v. State (Ala.), 9 South. Rep. 550. Under Code S. Car. § 588, which makes the husband and wife incompetent "to give evidence for or against the other in any action or proceeding on account of adultery, except to prove the fact of marriage," the husband of the female defendant in an indictment for adultery is a competent witness to prove her marriage to him. State v. McDuffie (S. Car.), 12 S. E. Rep. 83. On a trial for adultery, the husband of the woman is not a competent witness with the prosecution. Commonwealth v. Geary (Pa.), 9 Pa. Co. Ct. Rep. 60. A husband on a criminal prosecution cannot object to his wife's testifying against him where she does not object, since while under Code Crim. Proc. sec. 215, the court cannot compel the wife to testify against her husband, it may permit her to do so voluntarily. State v. Keer (Kan.), 30 Pac. Rep. 236. On a trial for bigamy, the person whom the indictment charges to be defendant's lawful wife is incompetent without defendant's consent to testify against him. State v. Ulrich (Mo.), 19 S. W. Rep. 656.

We have in the above note ignored the many cases which hold that in prosecutions of the husband for personal wrong or injury to the wife, the wife may testify. As will be noted, the question at issue in the principal case, and which the authorities fail to agree upon, is as to what is a personal wrong or injury to the wife or a crime committed against her within the meaning of exceptions in statutes on the subject. Though the question presented is not by any means clear, we are inclined to agree with the view as presented by the minority of the court.

CORRESPONDENCE.

OPINIONS OF THE SUPREME COURT OF ILLINOIS.

To the Editor of the Central Law Journal:

In your issue of Oct. 21, page 319 of the current volume, you quote from a pamphlet attacking the Supreme Court of Illinois, and give the matter a prominence upon your editorial page which I think you would not have done had you first examined the decisions complained of. Take a single instance as an example of the carelessness of the pamphleteer quoted from. He says the opinion in Ranson v. Henderson, 114 U. S. 528 runs counter to at least fifty decisions of that court in holding that a tax deed alone is *prima facie* evidence of title, when it had been the settled doctrine of that court for many years that a tax deed was absolutely void unless supported by a valid judgment, precept and notice. But section 224 of the Illinois Revenue Act of 1872, in force when the tax sale involved in that case was made, made the tax deed *prima facie* evidence that all steps had been regularly and legally taken necessary to make it a valid tax deed. The court in making the decision it did in 114 Ill., was enforcing this new statute, and it expressly based its judgment on the point in question upon the statute. The *prima facie* case made by the deed, as provided by the statute, was not overcome by evidence by the opposite party. The court distinguished the case from one where the party assailing the tax deed offered evidence to overcome the *prima facie* case made by the tax deed. The statute referred to was not in force when the former decisions were

made. The reviewer seems to have carelessly omitted to read the opinion he criticised and so has assailed a decision which is fully sustained by the statute, which had changed the rule of evidence. D.

Joliet, Ill., Oct. 23, 1892.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

CALIFORNIA....26, 29, 31, 70, 93, 96, 106
COLORADO....13, 22, 32, 33, 50, 59, 71, 85, 92, 102
INDIANA....7, 8, 52
IOWA, 2, 9, 10, 12, 15, 17, 18, 25, 27, 41, 43, 47, 51, 53, 57, 58, 61, 62, 64, 65, 68, 74, 76, 77, 82, 86, 87, 89, 97, 99, 101, 103, 108, 113
KANSAS....16, 23, 39, 72, 83
KENTUCKY....45, 60, 90, 98, 109, 117
MASSACHUSETTS....38, 107
MICHIGAN....30
MINNESOTA....49, 84
MISSOURI....20, 40, 42, 79, 80, 115
NEBRASKA....3, 24, 28, 34, 35, 37, 67, 105
NEW YORK, 5, 14, 19, 36, 44, 56, 63, 78, 91, 95, 104, 110, 111, 114, 116
OKLAHOMA....55
OREGON....4, 11, 21
PENNSYLVANIA....1, 46, 69, 73, 75, 88, 94, 100, 112
TENNESSEE....81
UNITED STATES C. C. OF APP. 6, 48, 54, 66

1. ACCORD AND SATISFACTION.—An agreement providing that defendant should pay plaintiff a certain sum, and gave certain securities at a certain time, and reciting that "the above is in lieu of" certain notes, is not to accept defendant's promise in lieu of the notes, but the money and securities; and therefore to bar action on the old notes, the accord must be executed, and tender of the money and securities will not operate as a satisfaction.—HOSLER V. HURSH, Pa., 25 Atl. Rep. 52.

2. ACCORD AND SATISFACTION.—In an action for breach of contract to deliver corn alleged to have been sold by defendant to plaintiffs, it appeared that after defendant had delivered a part of the alleged quantity he informed plaintiffs, that he could not spare any more, and demanded a settlement for the amount delivered. Thereupon plaintiffs computed the amount from their books, paid defendant therefor, and collected from defendant the price of a load of cobs which they had sold him: Held, that there was a final settlement under the contract.—MAINS V. MINTLE, Iowa, 53 N. W. Rep. 256.

3. ACCOUNTING — Demand.—In an action for an accounting by a principal against his agent, the defendant, in his answer, denied that he was indebted to plaintiff, or that he had any money or property belonging to him, and averred that he had accounted for all matters in controversy prior to the bringing of the suit, and also contested the case all through the trial upon the theory that nothing was due from him. It was held that the plaintiff was not required to prove a demand for an accounting prior to instituting the suit, in order to entitle him to recover costs.—CARLSON V. BECKMAN, Neb., 53 N. W. Rep. 203.

4. ACCOUNTING—Settlement—Pleading.—In a suit for an accounting, where the court finds that there was a settlement, but allows it to be opened for the purpose of showing errors or mistakes, plaintiff, should, before being allowed to introduce evidence, be compelled to amend his complaint so as to specify the errors and mistakes relied on.—HOYT V. CLARKSON, Oreg., 31 Pac. Rep. 198.

5. ADMIRALTY—Assault on Seaman.—The owners of a vessel are not liable, even under the maritime law, for a willful and malicious assault by the captain of the vessel on a seaman who refuses to obey a command on the plea of sickness, since, in committing the assault, he exceeds his authority. His command does not extend over the persons of the seamen beyond the infliction of usual and necessary punishment in case of disobedience or infraction of rules.—GABRIELSON V. WAYDELL, N. Y., 31 N. E. Rep. 969.

6. ADMIRALTY — Salvage—Compensation.—An award by the district court of salvage equal to the amount contracted for by the master will not be disturbed merely because it seems large in proportion to the value of the property saved, when it appears that the contract was entered into after full deliberation, and with opportunity to procure other aid, and that it seemed fair and just at the time it was made.—THE AGNES I. GRACE, U. S. C. C. of App., 51 Fed. Rep. 958.

7. ADOPTION — Rights of Adopted Children.—Elliott, Supp. § 423, provides that if a man marry a second wife, and has by her no children, but has children alive by a former wife, the fee in his lands shall, on his death, vest in such children, subject to a life estate in the widow; section 29 provides that an adopted child shall receive all the rights and interests in the estate of the adopting father and mother, as if he were their natural heir: Held, that a person adopted by decedent and his first wife is in the position of their natural heir, and inherits the adopting father's land, subject to the life estate of the second wife.—MARKOVER V. KRAUSS, Ind., 31 N. E. Rep. 1047.

8. ANIMALS — Partition Fences.—Rev. St. § 4848, as originally enacted, provided that a lawful partition fence should be such as was sufficient to inclose and restrain "sheep," unless the parties should agree to build a fence to restrain or inclose only "horses, mules, or cattle:" Held that, so far as "hogs" were concerned, the statute did not change the common law requiring the owners of domestic animals to keep them within their own enclosures.—ENDERE V. MCDONALD, Ind., 31 N. E. Rep. 1056.

9. APPEAL — Amount in Controversy.—Where, in an action on an account for an amount less than $100, defendant admits the account, but pleads a controverted counterclaim of more than $100, which appears on its face to be barred by the statute of limitations except as to the amount of plaintiff's account, the amount in controversy is less than $100, and it can only be heard on appeal on the certificate of the trial judge —SCHULTZ V. HOLBROOK, Iowa, 53 N. W. Rep. 285.

10. APPEAL—Jurisdiction.—Whether a case involves less than $100, as shown by a claim and counterclaim contained in the pleadings, and so requires to be certified by the lower court in order to give the appellate court jurisdiction, is to be determined, not from the prayer in the several pleadings, but from the allegations of fact therein.—NASH V. BECKMAN, Iowa, 53 N. W. Rep. 228.

11. APPEAL — Parties.—In a suit by one of several depositors of wheat stored in a warehouse in mass against the others to adjust and determine their rights, a deficiency having occurred, and three of defendants having taken out the whole amount of their deposits, a decree was rendered against the three and in favor of the other parties: Held, on appeal by two of the three, that as a deficiency, not occasioned by default of depositors, must be borne by them proportionally to their deposits, they were all necessary parties on appeal as well as below, since in equity a case on appeal is tried anew, and therefore the appellate court had no jurisdiction to hear the case, the third party against

whom the decree was rendered not having been served with notice of appeal.—HAMILTON v. BLAIR, Oreg., 31 Pac. Rep. 197.

12. APPEAL—Record.—Where there is nothing in the record to show that the appeal has been perfected, or that notice of appeal has been served on the clerk of court, as required by Code, § 4408, the appeal will be dismissed.—BAER v. MERCHANTS' & BANKERS' INS. CO., Iowa, 53 N. W. Rep. 287.

15. ATTACHMENT—Affidavit.—Under Civil Code, § 92, an affidavit for attachment is defective where it alleges that a certain sum is due and unpaid "on overdue book accounts, and on contracts for the direct payment of money," without stating what portion of the amount is due on each; but the proceedings under the attachment are not void, since plaintiff may amend the affidavit.—LEPPEL v. BECK, Colo., 31 Pac. Rep. 185.

14. ATTACHMENT—Bank.—A bank is not indebted to a defendant who has purchased from it a draft which is still outstanding, and on which no default has been made by the drawee; and therefore the money paid by defendant for the draft cannot be levied under attachment as money due defendant from the bank.—CENTRAL CITY BANK v. PARENT, N. Y., 31 N. E. Rep. 977.

15. ATTACHMENT—Lien.—An attachment of property which had been sold by the debtor previous to the levy, but of which no transfer of possession had been made by which the attaching creditor had notice of such sale, renders the property liable for the amount of the judgment subsequently obtained, and not merely for what was due at the time the levy was made.—MILLER v. JAMES, Iowa, 53 N. W. Rep. 227.

16. BILL OF EXCEPTIONS.—A bill of exceptions, to become a part of the record, must be presented, allowed, signed, and filed at the same term of court the decision is made.—CITY OF SOUTH HAVEN v. CHRISTIAN, Kan., 31 Pac. Rep. 154.

17. BROKERS — Compensation.—Where loan brokers are employed to secure a loan, and different propositions as to compensation are made from time to time, and when the loan was finally made another proposition as to the compensation fails of approval, and the parties separate, expressing themselves merely as willing to do what is right in the matter, evidence as to the reasonable value of the services rendered is in view of the uncertainty of any agreement for specified compensation, properly admitted.—CARRUTHERS v. TOWNE, Iowa, 53 N. W. Rep. 240.

18. CHATTEL MORTGAGE.—A recital in a duly-recorded chattel mortgage, of the existence of a prior mortgage on the same property, which prior mortgage fully describes the mortgaged property, is sufficient to put a subsequent judgment creditor of the mortgagor on inquiry; and where such inquiry would have led to a complete identification of the mortgaged property, its sale on execution will be enjoined at the suit of the second mortgagee, though the description of the property in the second mortgage, standing alone, may not have been technically sufficient.—KNELLER v. KNELLER, Iowa, 53 N. W. Rep. 271.

19. CONFLICT OF LAWS — Taxation—Exemption.—An exemption of property from taxation accorded a foreign savings bank by the laws of the State of its creation is of no avail to exempt property owned by it in this State.—PEOPLE v. COLEMAN, N. Y., 31 N. E. Rep. 1022.

20. CONSTITUTIONAL LAW — Collateral Attack.—Until the constitutionality of an act of the legislature in establishing a criminal court in a certain county is questioned by the State, on the ground of insufficient population in such county, in a direct proceeding for that purpose, it will be presumed the legislature acted on sufficient information, and such act cannot be collaterally attacked in a criminal action on appeal from such court.—STATE v. RENFROW, Mo., 20 S. W. Rep. 299.

21. CONSTITUTIONAL LAW— Medicine and Surgery.—The provision of Sess. Laws 1889, p. 144, as amended by Sess. Laws 1891, p. 153, which authorizes the issuance of a certificate of qualification to a person without examination, who was engaged in practice when the act took effect, does not violate Const. Or. art. 1, § 20, which declares that "no law shall be passed granting to any citizen or class of citizens privileges or immunities which, on the same terms, shall not equally belong to all citizens;" nor Const. U. S. art. 4, § 2, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States;" nor to Const. U. S. 14th Amend., which provides that "no State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States."—STATE v. RANDOLPH, Oreg., 31 Pac. Rep. 201.

22. CONSTITUTIONAL LAW — Railroad Companies — Stock Killing.—2 Mills' St. § 3712, which makes railroad companies liable absolutely for stock killed, without regard to the question of negligence or the violation of any statute, enacted in the exercise of the police power, and section 3713, which imposes a penalty of double the appraised value of the animals killed, together with an attorney's fee, for failure to pay within 30 days, are repugnant to Const. U. S. 14th Amend., as well as to Const. art. 2, § 25, which provides that no person shall be deprived of life, liberty, or property without due process of law.—DENVER & R. G. RY. CO. v. OUTCALT, Colo., 31 Pac. Rep. 177.

23. CONSTITUTIONAL LAW — Special Legislation. — Chapter 98, Sess. Laws 1891, authorizing the board of county commissioners of Shawnee county to construct and maintain a bridge across the Kansas river, on Quincy street, is unconstitutional and void, because obnoxious to the provisions of sections 1 and 5 of article 12 of the constitution of the State; therefore, the board of county commissioners of Shawnee county are without power to construct a bridge under the provisions of said act, across the Kansas river, within the city of Topeka.—BOARD OF COM'RS OF SHAWNEE COUNTY v. STATE, Kan., 31 Pac. Rep. 149.

24. CONSTITUTIONAL LAW—Title of Act.—The provision of section 11, art. 3, of the constitution, that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title," has no application to laws in force at the time of the adoption thereof.—STATE v. ROBINSON, Neb., 53 N. W. Rep. 213.

25. CONTEMPT— Evidence.— Statements of a witness before a referee in proceedings supplementary to execution may be used as admissions against him in contempt proceedings, since such proceedings do not involve the question of fraud, within the meaning of Code, § 3138, which provides that, though a person shall not be excused from giving testimony in supplementary proceedings because it would tend to convict him of a fraud, yet such testimony shall not be used against him in a prosecution for the fraud.—PARK v. JOHNSON, Iowa, 53 N. W. Rep. 285.

26. CONTRACTS — Consideration — Railroad Fences.—In proceedings to condemn land for a railroad the complaint prayed the court to ascertain, in accordance with Code Civil Proc. § 1248, the cost of fences along the line of the road, and of cattle-guards where necessary, and a bond for the construction of the fences was given, with the sureties required by section 1251: Held, in an action to recover from the sureties for violation of the bond, that, since the principals had taken possession of the land and built their railroad, sufficient consideration had passed to support the contract in the bond, even if the bond given was not a statutory one.—FARLEY v. MORAN, Cal., 31 Pac. Rep. 158.

27. CONTRACT—Damages.—For a railroad contractor's breach of an agreement to furnish a subcontractor with the necessary tools to do the grading of a railroad track, the subcontractor may recover the rental value of tools purchased and used by him in the prosecution of the work, and also for such loss of time, by himself, his men, and teams, as he could not, by the exercise of reasonable diligence, have protected himself against, since such damages are the natural result of the breach of the contract, and must have been within the con-

templation of the parties when it was made.—GRAVES v. GLASS, Iowa, 53 N. W. Rep. 231.

28. CONTRACT OF GUARANTY—Assignment.—Under the statute of this State, a contract of guaranty is assignable, and the assignee may maintain an action thereon in his own name.—WEIR v. ANTHONY, Neb., 53 N. W. Rep. 206.

29. CONTRIBUTORY NEGLIGENCE.—Where a train man continues in the employ of the railroad company after full knowledge that the cars were defective in construction and the train force deficient in number, he assumes the risk arising therefrom, and cannot recover in an action for personal injuries caused thereby.—LONG v. CORONADO R. CO., Cal., 31 Pac. Rep. 170.

30. CORPORATIONS—Officers.—In an action by a stockholder against the corporation, its directors, and other stockholders, it appeared that for a number of years defendant L had owned a majority of the stock; had caused himself to be made a director, along with two others who held stock in trust for him, and were under his control; that this board of directors had elected L president and manager of the corporation at a large salary, and had made contracts leasing to the corporation at large rentals property which he owned: Held that, since L directly influenced and controlled the board, he made the contracts fixing salaries and rentals with himself, and they were consequently void.—MINER v. BELLE ISLE ICE CO., Mich., 53 N. W. Rep. 218.

31. CORPORATIONS—Stockholders.—A resolution of the board of directors authorizing the secretary to borrow money for the corporation is sufficient, though not entered on the minute book, and, therefore, in an action against stockholders to recover the money so borrowed, the admission in evidence of a resolution adopted by the board and entered on its minutes is immaterial.—BANK OF YOLO v. WEAVER, Cal., 31 Pac. Rep. 160.

32. COUNTIES—Boundary — Jurisdiction.—Sess. Laws 1887, p. 238, provides that when the boundary lines of any county are uncertain, and the territory is in dispute between the two territorial subdivisions, the State engineer may be called on to run the line and determine the question, and that if the action of the engineer is unsatisfactory to either county, suit may be brought in a court of competent jurisdiction after the plat is filed by the engineer to determine and settle the boundary: Held, in an action between two counties to determine such boundary, that the court had jurisdiction to render a judgment on the evidence establishing the boundary, and was not limited to the determination of the accuracy of the line run by the State engineer.—BOARD OF COM'RS OF GUNNISON COUNTY v. BOARD OF COM'RS OF SAGUACHE COUNTY, Colo., 31 Pac. Rep. 183.

33. COUNTY CLERK—Regulations of Office.—A county clerk is entitled to reasonable discretion in making regulations, which must be complied with by those desiring to use the records of his office.—UPTON v. CATLIN, Colo., 31 Pac. Rep. 172.

34. COURTS—Decrees—Mistakes.—A district court has the power to correct a mistake in the record entry of a decree, at a term subsequent to that at which it was rendered, so as to make the same correspond with the decree actually pronounced by the court, and to conform to the pleadings in the case.—HOAGLAND v. WAY, Neb., 53 N. W. Rep. 207.

35. COURTS—Jurisdiction.—Where a statute upon a particular subject has provided a special tribunal for the determination of questions pertaining to such subject, the jurisdiction of such tribunal is exclusive, unless otherwise expressed or clearly implied from the act.—HENDRESCHKE v. HARVARD HIGH SCHOOL DIST., Neb., 53 N. W. Rep. 204.

36. COURTS—Jurisdiction of State Courts.—The fact that the State has ceded land in the city of Brooklyn, and political jurisdiction over it, to the United States, for the purpose of a navy yard, does not oust the State courts of jurisdiction as to private rights and remedies within such territory, at least so long as congress makes no new regulations touching the administration of justice in civil actions arising therein; and therefore the city court of Brooklyn by virtue of the jurisdiction conferred on it by Civil Code, § 263, subd. 3, respecting injuries to land within the city, has jurisdiction of an action of trespass committed on a part of such ceded land, which part had been leased by the federal government to the city under whom plaintiff claims as a sublessee.—BARRETT v. PALMER, N. Y., 31 N. E. Rep. 1017.

37. COURT—Terms.—While the general rule is that a court cannot be held at a time when there is clearly no authority to hold it, and if there was no statutory authority to that effect, the district court in those districts having but one judge could not be held in two counties of the same district at the same time; but, under the constitution and statutes of this State, terms of the district court may be held at the same time in different counties of the same judicial district, and, when necessary, the district court sitting in any county may be continued into and held during the term fixed for holding such court in any other county within the district, or it may be adjourned and held beyond such time.—TIPPEY v. STATE, Neb., 53 N. W. Rep. 208.

38. CRIMINAL EVIDENCE—Murder.—The intention of a person to commit suicide is proper to be shown on the trial of one accused of the murder of such person, as tending to throw light on the manner of his death, when the circumstances are not inconsistent with the theory of suicide.—COMMONWEALTH v. TREFETHEN, Mass., 31 N. E. Rep. 961.

39. CRIMINAL LAW—Appeal by the State.—The defendant pleaded "Not guilty" to a criminal charge, and the cause was submitted to the court without a jury upon an agreed statement of facts; and it was further agreed that the entire law of the case might be made a question reserved for the purpose of an appeal by the State. The court found the defendant not guilty, and entered a judgment of acquittal; after which the State attempted to appeal: Held, that the prosecution is finally ended, and that an appeal by the State will not lie.—STATE v. LEE, Kan., 31 Pac. Rep. 147.

40. CRIMINAL LAW—Assault with Intent to Kill.—Where defendant in a criminal case is on trial for assault with intent to kill, by stabbing, cutting, and wounding the prosecuting witness, it is proper to instruct the jury that they may find defendant "guilty of assault with intent to kill or do some great bodily harm," if they find the stabbing or cutting was without malice aforethought.—STATE v. KING, Mo., 20 S. W. Rep. 299.

41. CRIMINAL LAW — Forgery—Alteration of Instrument.—A bill to the steamer Irene for merchandise sold was paid by defendant, a part owner, and receipted by the creditor in full. Defendant subsequently wrote his own name after the words "Str. Irene," and connected them by the word "and." In an action for goods sold to defendant individually several years later, and differing in kind from those sold to the steamer, defendant denied the debt, and introduced in evidence the receipted account to the steamer as altered by him: Held, that the alteration was not material, and did not constitute a forgery.—STATE v. DORRANCE, Iowa, 53 N. W. Rep. 281.

42. CRIMINAL LAW—Robbery.—The word "felonious," though not proper in an instruction for robbery to express the intent with which the act was done, because expressing an entire class of offenses, instead of an element of a particular offense, should, when used, be defined as a word of technical meaning, after which the facts necessary to the intent should be stated.—STATE v. JOHNSON, Mo., 20 S. W. Rep. 302.

43. CRIMINAL TRIAL—Absence of Defendant.—Under Code, § 4351, which provides that a trial for a misdemeanor may take place in defendant's absence if he appears by counsel, the court may decline to recognize the withdrawal of defendant's attorney, made when the case is called for trial, in the absence of defendant

for the purpose of preventing a trial, and it may require such attorney to continue his appearance; but if it fails to do this, and recognizes such withdrawal, and proceeds with the trial in defendant's absence without any one representing him, a conviction cannot be sustained.—STATE v. YOUNG, Iowa, 53 N. W. Rep. 272.

44. DEED—Bona Fide Purchaser.—A daughter to whom her father conveys a farm worth $20,000 in consideration of $10, which is paid, and of her undertaking to pay the net proceeds of the place to him during his life, and after his death a certain portion thereof to his wife and other daughter, is not "a purchaser in good faith and for a valuable consideration," within the meaning of the recording act, so as to entitle her deed to prevail over a prior unrecorded conveyance by the father.—TEN EYCK v. WHITBECK, N. Y., 31 N. E. Rep. 994.

45. DEED — Condition—Building Restriction.—A condition in a deed prohibiting the grantor from "erecting any building more than one story high" on his adjoining lot, so that the grantee "should not be incommoded in regard to light and air by any high building," does not confine the grantor to the precise height of a one-story building standing on the premises when the deed was executed; and hence the condition is not violated by the grantor in increasing the height of such one-story building by two feet, so as to make it uniform in height with the first floor of a building in front of it, giving him an increase of store room, rendered necessary by the growth of the town.—HOBSON v. CARTWRIGHT, Ky., 20 S. W. Rep. 281.

46. EJECTMENT—Burial Lots.—A deed conveying an exclusive right of interment or sepulture in certain burial lots, to be held "for the uses and purposes of sepulture only," subject to the rules, regulations, and restrictions contained in the articles of a cemetery association, does not grant an interest in the soil, but merely an exclusive license or privilege to make interments in the lots described, and hence the grantee acquires no such interest or such right of possession as will enable him to maintain ejectment for the lots.—HANCOCK v. MCAVOY, Penn., 25 Atl. Rep. 47.

47. EJECTMENT—Mesne Profits.—Where the tax title under which land was possessed for a number of years was declared void, the true owner may recover from the holder thereof the reasonable value of the use of the land during such possession, rather than the amount actually received by him from the land.—BRADLEY v. BROWN, Iowa, 53 N. W. Rep. 269.

48. EJECTMENT — Title.—In ejectment, no length of chain of title by deeds which does not reach back to the sovereignty of the soil, and which fails to show possession by one of the grantors, is in itself sufficient to constitute *prima facie* evidence of title which would require defendant in possession to defend his possession; and the payment of taxes by plaintiff on the land conveyed by such deeds does not, as a matter of law, show possession.—FLORIDA SOUTHERN R. CO. v. LORING, U. S. C. C. of App., 51 Fed. Rep. 932.

49. EMINENT DOMAIN—Condemnation of Land.—Application of the rule that in assessing damages for taking private property for public use damages to the tract of which the property taken was a part may be included.—DULUTH & W. R. CO. v. WEST, Minn., 53 N. W. Rep. 197.

50. EMINENT DOMAIN—Procedure—Pleading.—In proceedings for the condemnation of property under the eminent domain act, no provision is made for any pleadings further than the petition, except in certain cases for the filing of a cross petition; and hence a refusal of the court to allow petitioner an extension of time to reply or demur to an answer put in by defendant is not error, all pleadings subsequent to the petition, with the exception above named, being superfluous.—DENVER & R. G. R. CO. v. GRIFFITH, Colo., 31 Pac. Rep. 171.

51. EQUITY—Rescission of Contract.—An exchange of valuable and improved village lots for an 80-acre tract of land, situated in another State, practically worthless for any purpose, made in reliance on representations that such 80-acre tract was good farming land, and of the actual value of $10 per acre, will be rescinded in an equitable action brought for that purpose, though defendant, who made the representations, had no knowledge of their falsity.—SMITH v. BRICKER, Iowa, 53 N. W. Rep. 250.

52. ESTOPPEL — Validity of Assessment.—Where a trustee, who is directed to pay the income of the trust fund, "less the taxes assessed thereon," to the beneficiary, retains from such income the amount of the taxes assessed against the fund, and represents to the beneficiary that it was the amount due for taxes, but does not pay them, he is estopped from afterwards denying the validity of the assessment.—THIEBAUD v. TAIT, Ind., 31 N. E. Rep. 1052.

53. EVIDENCE — Admissions by Agent.—Where lands owned by a wife are exchanged by her husband acting as her agent, a letter written by him two days afterwards, and without her knowledge, narrating the negotiation to a third person, is not admissible in evidence as an admission of the wife in an action against the husband and wife for false representations.—PHELPS v. JAMES, Iowa, 53 N. W. Rep. 274.

54. FEDERAL COURTS — Appeal—Circuit Court of Appeals.—Where the supreme court, after affirming the jurisdiction of the circuit court, remands the cause, and directs the taking of an account, but without in any way passing upon the amount to be found due, the final decree of the circuit court, ascertaining such amount, is in no sense a mere execution of the judgment and mandate of the supreme court so that the same can be reviewed by *mandamus*. The proper method of review is by a new appeal; and where the new decree is rendered after July 1, 1891, and the cause does not fall within any of the provisions of section 5 of the act of March 3, 1891, such appeal must be to the Circuit Court of Appeals.—NASHUA & L. R. CORP. v. BOSTON & L. R. CORP., U. S. C. C. of App., 51 Fed. Rep. 929.

55. FEDERAL OFFENSE — Perjury — Indictment.—In a prosecution by the United States in a territorial court, the sufficiency of the indictment and the indorsements thereon must be tested by the requirements of the federal statutes; and, since there is no law of the United States requiring the names of witnesses to be indorsed upon the indictment, absence of such indorsement is a mere imperfection in form, which imperfection Rev. St. U. S. § 1025, declares shall not affect the indictment unless they tend to the prejudice of defendant.—FISHER v. UNITED STATES, Okla., 31 Pac. Rep. 195.

56. GAME LAWS—Sale of Live Birds.—Under Laws 1879, ch. 534, § 12 as amended by Laws 1880, ch. 584, § 2, providing that no person shall "kill or expose for sale, or have in possession after the same is killed," certain specified birds, "under a penalty of five dollars for each bird so killed, exposed for sale, or had in possession," a person is not liable for having live birds in her possession and exposing them for sale.—PEOPLE v. FISHBOUGH, N. Y., 31 N. E. Rep. 983.

57. HIGHWAY — Establishment.—Where a culvert is put in an established highway by the officer having authority to work the same, and the road is traveled more or less until fenced in by plaintiff, the facts are sufficient to show an acceptance of such highway by the public.—DEVOE v. SMELTZER, Iowa, 53 N. W. Rep. 287.

58. HOMESTEAD—Abandonment.—A wife is entitled to intervene, under Code, §§ 2683, 2685, for the protection of her homestead right, in an action against the husband for specific performance of a contract to convey, as having a direct interest in the litigation, although her said right may have been fully protected also in the husband's answer.—PERRY v. DILLRANCE, Iowa, 53 N. W. Rep. 280.

59. HOMESTEAD— Exemption.— Mills' Ann. St. § 2132, gives every householder who is the head of a family a homestead "exempt from execution and attachment, arising from any debt, contract, or civil obligation."

Section 2133 provides that, in order to become entitled to the benefit of the act, the word "Homestead" must be entered in the margin of the recorded title to the land, and the entry signed by the owner and attested: Held, that land designated as a homestead before the issuance of an execution was exempt from its operation, though the judgment was obtained before the householder acquired title to the land or designated it as a homestead.—WOODWARD V. PEOPLE'S NAT. BANK, Colo., 31 Pac. Rep. 184.

60. HOMESTEAD—Relinquishment by Mortgage.—Gen. St. ch. 38, art. 13, § 13, provides that the right to a homestead shall not be waived, nor dower relinquished, except by written conveyance thereof, signed by the husband and wife, and acknowledged and recorded: Held, that the homestead right of the wife is barred by joining with her husband in the execution of a mortgage of the latter's land, wherein it is recited that she "hereby waives right of homestead and dower in and to the real estate mentioned in this mortgage," though her name does not appear in the granting clause.—DAVIS JENKINS, Ky., 20 S. W. Rep. 283.

61. INSURANCE.—Under McClain's Code, § 1734, providing that no action shall be begun on an insurance policy within 90 days after notice of loss has been given, an action commenced within such time is premature, though it is brought after the loss has become payable by the terms of the policy.—WILHELIM V. DES MOINES INS. CO., Iowa, 53 N. W. Rep. 233.

62. INSURANCE—Notice—Mailing.—Under the articles of incorporation of a mutual fire company, which prohibited the suspension of a member for non-payment of assessments until after the expiration of 30 days from the "mailing of a registered letter to him by the secretary, containing notice of such assessment," the 30-day period does not run from the date that the letter was deposited in the post office to be mailed and registered, but from the date that the registration was completed by making the proper entries in the books of the post office, and the procuring of a receipt by the sender, as provided in the postal regulations.—HOLBROOK V. MILL OWNERS' MUT. INS. CO., Iowa, 53 N. W. Rep. 229.

63. INSURANCE—Title of Property.—Plaintiff's insurance policy provided that, if insured is not the "sole, absolute, and unconditional owner of the property insured, or if said property be a building, and the insured be not the owner of the land on which it stands by title in fee-simple, and this fact is not expressed in the written portion of the policy," it should be void: Held, that the policy was not void under the condition, though plaintiff's title to the realty on which the insured building stood was only a contract of purchase, and that fact did not appear in the policy, where the insurance was placed by a solicitor employed by defendant's agent, and plaintiff informed such solicitor of the condition of his title.—CARPENTER V. GERMAN-AMERICAN INS. CO., N. Y., 31 N. E. Rep. 1015.

64. INTOXICATING LIQUORS — Illegal Sale. — Acts 22d Gen. Assem. ch. 73, § 4, provides that an injunction to restrain a liquor nuisance shall bind the person enjoined throughout the judicial district in which the action is brought, and, if one so enjoined shall again be concerned in the sale of liquor in the district, he shall be guilty of contempt: Held, that one might be adjudged so guilty though the action in which the injunction was granted was begun before the act took effect, and though the decree for an injunction did not in terms provide that it should operate throughout the district.—MCGLASSON V. JOHNSON, Iowa, 53 N. W. Rep. 267.

65. JUDGMENT—Confession—Nunc pro Tunc.—Where one of two partners makes a statement for confession of judgment on an indebtedness of the firm, wherein he authorizes the clerk to render judgment against him, as a member of the firm, and against the firm, and the clerk enters judgment against the firm only, the court will, on motion of the creditors in whose favor the confession was made, causes judgment to be entered *nunc pro tunc* against such partner.—RISSER V. MARTIN, Iowa, 53 N. W. Rep. 270.

66. MARITIME LIENS—Services of Stevedore.—A stevedore rendering services in loading or unloading cargo in other than the home port has a maritime lien therefor.—THE MAIN, U. S. C. C. of App., 51 Fed. Rep. 954.

67. MARRIAGE—Validity.—Where a marriage is solemnized before any person professing to be a justice of the peace, minister of the gospel, or other person authorized by law to solemnize marriages, and it is consummated with the full belief on the part of the persons so married, or either of them, that they have been lawfully joined in wedlock, the marriage will be valid, although the person before whom it was solemnized had no authority.—HAGGIN V. HAGGIN, Neb., 53 N. W. Rep. 210.

68. MASTER AND SERVANT— Authority of Train Conductor —Where the only regular brakeman on a train is absent, the conductor has authority to supply his place, and, for the time being, the person so engaged is an employee of the company.—FOX V. CHICAGO, ST. P. & K. C. R. CO., Iowa, 53 N. W. Rep. 259.

69. MECHANICS' LIENS.—Under the mechanic's lien laws, which authorize a material-man who, under one contract, has furnished material used in the erection of adjoining buildings owned by the same person to file a joint lien claim against all such buildings, designating the amount which he alleges to be due on each, the chief criterion to determine whether one joint lien claim can be filed against several buildings thus erected is the contract under which the claim arises, the characteristic of the adjoinder of the buildings not being so prominent; and therefore the fact that an owner of a city block has left a narrow strip of land between two rows of houses erected thereon by him does not make the houses fronting on one side of the strip so wholly separate and distinct from those on the other side as to prevent the inclusion of them all in one general apportioned lien claim.—ATKINSON V. SCHOEMAKER, Pa., 25 Atl. Rep. 59.

70. MECHANICS' LIENS—Evidence.—Where the court found in one action that "the building was completed on the 2d day of August, 1889," and in another that it "was never actually completed," the findings are not fatally contradictory when it appears that, though the building was never actually completed, work on it continued until July 2, 1889, from which date there was a cessation for more than 30 days.—MARBLE LIME CO. V. LORDSBURG HOTEL CO., Cal., 9 Pac. Rep. 164.

71. MECHANICS' LIEN— Foreclosure — Parties.— Laws 1883, p. 233, § 25, relating to mechanics' liens, provides that the court may proceed to hear and determine said liens and claims; that judgment shall be rendered according to the rights of the parties; that the various rights of all the lien claimants and other parties in any such action shall be determined and incorporated in one judgment or decree; that each party who shall establish his claim shall have a judgment against the party personally liable to him for the full amount of his claim so established, and shall have a lien established in said decree upon the property to which his lien shall have attached to the extent hereinbefore stated: Held, that the contractor was an indispensable party to an action by a material-man to establish and foreclose a mechanics' lien against the owner, since the right to a lien is dependent upon the indebtedness of the contractor.—DAVIS V. JOHN MOUAT LUMBER CO., Colo., 31 Pac. Rep. 187.

72. MORTGAGE FORECLOSURE — Judicial Sale. — The purchaser at a judicial sale of mortgaged premises is entitled to the growing crop of wheat on the land against the tenant of the mortgagor, who took a lease of the land after a suit for foreclosure had been commenced, and planted the wheat after judgment had been rendered in the foreclosure action, the purchaser having acquired a sheriff's deed on the 2d day of February, and the wheat not ripening, and being ready for harvesting, until the 20th day of June.—GOODWIN V SMITH, Kan., 31 Pac. Rep. 153.

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73. MUNICIPAL CORPORATIONS—Contracts.—A contract which the water commissioners of a city have authority to make, and which they do make as a board and not as individuals, is binding on the city, in the absence of a statute defining the mode of making such contracts, though it is not made at their office in the presence of their secretary, and has not been reduced to writing, and entered in the minutes kept by him of their pro ceedings.—DUNLAP v. WATER COM'RS OF CITY OF ERIE, Pa., 25 Atl. Rep. 60.

74. MUNICIPAL CORPORATION—Defective Sidewalks.—In an action for damages against a city for injuries sustained because of an alleged defective sidewalk, it appeared that an ordinance of the city directed that the board walks of the kind on which plaintiff was injured should have three stringers, but the walk in question had only two: Held that, while the ordinance was not the standard of care, its provisions were properly considered by the jury in determining whether the walk was properly constructed.—SMITH v. CITY OF PELIA, Iowa, 53 N. W. Rep. 226.

75. MUNICIPAL CORPORATION—Defective Streets.—In an action against a city for personal injuries sustained by falling into an improperly guarded area way nearly five feet wide, and extending over five feet from the building line into the sidewalk, evidence is not admissible to show that it is customary and necessary, for the convenient use of dwelling houses in the city, to have underground entrance into them, as no usage or custom will justify an encroachment on a highway, or the presence therein of an obstruction which renders it unsafe for the uses to which it is dedicated.—MCNERNEY v. CITY OF READING, Pa., 25 Atl. Rep. 57.

76. MUNICIPAL CORPORATIONS—Severance of Territory.—Under Code, § 443, authorizingla severance of land included within the limits of a town or city, if the court or jury shall be "satisfied that the prayer of the petitioner should be granted," it is not an abuse of discretion for the court to refuse a severance, where the land in question is within a block of the business portion of the town, and it appears that portions of such land are desirable for residences.—MONK v. INCORPORATED TOWN OF GEORGE, Iowa, 53 N. W. Rep. 240.

77. MUTUAL BENEFIT ASSOCIATIONS—Assessments.—Certain certificates of insurance in a mutual benefit association provided that the assured would pay certain assessments on the death of members, "said payments to be made within thirty days from date of notice of said death;" and that failure to pay within such time rendered the certificates void: Held, that there must be actual notice to the assured of such death before a forfeiture would result for non-payment of assessments.—COURTNEY. v. UNITED STATES MASONIC BEN. ASS'N., Iowa, 53 N. W. Rep. 238.

78. NEGLIGENCE—Dangerous Premises—Indemnity.—Where a judgment is recovered against and paid by the lessee of a wharf for injuries to a person caused by a defect due to the negligence of a sublessee and occupant thereof, and to which the lessee did not contribute, he may sue the sublessee for indemnity.—OCEANIC STEAM NAV. CO. LIMITED v. COMPANIA TRANSATLANTICA ESPANOLA, N. Y., 31 N. E. Rep. 987.

79. NEGLIGENCE—Qualification of Guardian.—Rev. St. § 5279, provides that the father shall be the natural guardian of his children, and have the care and custody of their estates, "and, when such estate is not derived from the parent acting as guardian, such parent shall give security and account as other guardians:" Held, that where a father sues as guardian of his infant child, to recover for personal injuries to the latter, he should first qualify by giving security.—SPILLANE v. MISSOURI PAC. RY. CO., Mo., 20 S. W. Rep. 293.

80. NEGLIGENCE—Petition.—In an action for personal injuries, caused by an elevator, while in defendant's employ, the only negligence alleged was that defendant failed "to provide suitable and proper rules for the running and management of said elevator, whereby plaintiff could have been warned of its descent, and in permitting it to descend on plaintiff without notice or warning." It was not alleged that defendants had any authority or control over the elevator: Held, that plaintiff was not entitled to recover.—TROTH v. NARCROSS, Mo., 20 S. W. Rep. 297.

81. NEGOTIABLE INSTRUMENTS—Indorsement.—Where a note, indorsed by the payee, and discounted at bank, is not paid when due, but the payee takes from the maker a new note, and then, to enable it to discount said note and pay off the old note, procures the indorsement of third persons but not at the request of the maker, after which indorsement is made by the payee, no such intention of the indorsers to strengthen the credit of the maker is shown as to render them liable to the payee, either as joint makers or guarantors.—MORRISON LUMBER CO. v. LOOKOUT MOUNTAIN HOTEL CO., Tenn., 20 S. W. Rep. 292.

82. NUISANCE—Injunction.—Under Code, § 331, providing that in cases of nuisance a civil action may be brought by the person injured, "in which action the nuisance may be enjoined and abated, and damages also recovered therefor," one, on recovering damages for a permanent nuisance, is not entitled, as a matter of right, to an injunction, or an order for the abatement of such nuisance.—DOWNING v. CITY OF OSKALOOSA, Iowa, 53 N. W. Rep. 256.

83. OFFICERS—De Facto Clerk—School District.—A person, having at some prior time been legally elected the clerk of a school district, still in the possession of the office, claiming the rightful possession thereof, and also claiming to be legally entitled to hold the same, cannot be convicted, under section 52, ch. 92, Gen. St. 1889, relating to schools (paragraph 5613, Gen. St. 1889), for neglecting or refusing to deliver the records, books, and papers belonging to the office to one not in possession of the office, but claiming the same under a subsequent election.—STATE v. DEAN, Kan., 31 Pac. Rep. 146.

84. PRACTICE—Stipulations.—Where issues have been made by the pleadings in an action of ejectment, and thereafter judgment has been entered upon a stipulation of the parties that the action shall be dismissed "on its merits," it cannot be regarded as an ordinary statutory dismissal by consent of parties. Such judgment is upon the merits of the case.—CAMERON v. CHICAGO, M. & ST. P. RY. CO., Minn., 53 N. W. Rep. 200.

85. PRINCIPAL AND AGENT—Purchase of Land.—Where the only instruction given an agent is that he shall visit a certain addition, select some lots, and pay the sum demanded as part of the price, without any limitation upon his discretion, the principal cannot rescind any contract made by the agent for the purchase of lots, or recover any sum paid on account thereof, unless a failure of consideration, defect in the title, or other like circumstance, be made to appear.—BOULDER INVESTMENT CO. v. FRIES, Colo., 31 Pac. Rep. 174.

86. QUIETING TITLE—Pleading.—In an action to quiet title, plaintiff and defendant claimed through a common source. The deed through which defendant claimed was of a later date than that of plaintiff, but was recorded earlier. Defendant's answer did not in terms allege that his ancestor in title had no notice of the prior conveyance: Held, that this omission was a mere defect in title, not to be taken advantage of on the introduction of evidence, but by motion to make the answer more specific.—PILLSBURY v. BALDWIN, Iowa, 53 N. W. Rep. 278.

87. RAILROAD COMMISSIONERS.—Where the only evidence to sustain the finding of the railroad commissioners, that a private farm crossing at grade is dangerous, consists of the opinions of witnesses, without any facts to support them, an order of the commissioners, directing the railroad company to construct an overhead crossing, will not be enforced by the courts, as Acts 1884, ch. 133, requires the courts to first find that the orders they are called on to enforce are reasonable and just.—STATE v. CHICAGO, M. & ST. P. R. CO., Iowa, 53 N. W. Rep. 253.

88. RAILROAD COMPANIES — Fencing.— Act March 28, 1868 (P. L. 514), requiring railroad companies in certain counties to construct fences along their tracks, and providing that, if a company neglect its duty, any person may build a fence, and recover therefor from the company, does not attempt to make the company ultimately liable for fencing where theretofore the land owner has been awarded compensation for damages, including the burden of fencing.—WELLES v. NORTHERN CENT. RY. CO., Pa., 25 Atl. Rep. 51.

89. RAILROAD COMPANIES—Negligence.—Plaintiff was lawfully on defendant's depot grounds, unloading corn into a crib which was near two highway crossings, when defendant's engine passed without signal, and frightened plaintiff's team, causing them to run away and injure plaintiff: Held, under Acts 20th Gen. Assem. Iowa, ch. 104, providing that no railroad engine shall approach a highway crossing without giving a signal, and making the neglect to give such signal a misdemeanor, that defendant was liable, though plaintiff was not attempting to use such crossing.—LONERGON v. ILLINOIS CENT. R. CO, Iowa, 53 N. W. Rep. 236.

90. RAILROAD COMPANIES—Trespasser on Street Car. —A 17 year old boy, who has the intelligence, experience, and judgment that boys of that age usually have, is guilty of inexcusable and illegal conduct in jumping on the platform of a moving street car, seizing the driver's whip, and whipping the mules; and there can be no recovery for his death caused by his falling off the car, which the driver, owing to the speed of the mules, was unable to stop in time to prevent his being run over.—TAYLOR'S ADM'R v. SOUTH COVINGTON & C. ST. RY. CO., Ky., 20 S. W. Rep. 275.

91. RECEIVERS — Accounting.—An action at law for the default of a receiver cannot be maintained against his sureties before an accounting of the receivership. —FRENCH v. DAUCHY, N. Y., 31 N. E. Rep. 1041.

92. RELEASE AND DISCHARGE—Impeachment.—W recovered judgment against M and B in justice court. While an appeal to county court was pending, a compromise was effected between W and C, agent of M and B under which a portion of the judgment was to be paid, and a receipt was given by W in full settlement of the case. The receipt was not filed in county court. The judgment was not discharged of record, but the appeal was dismissed, and the case was remanded. Execution was issued for the entire judgment: Held, in a suit to restrain a levy under such execution that as the receipt was not in full of the amount of the judgment except by the agreement of the parties, when challenged, it could not be held a discharge.—MADELEY v. WHITE, Colo., 31 Pac. Rep. 181.

93. SALE—Good Will—Evidence.— Defendant sold to plaintiff the good will of his "saddlery, harness, and carriage trimming business," and agreed not to enter a like business in the same place while plaintiff, or any one deriving title to the good will from him, was engaged in such business. Later he engaged in a general merchandise business in that place, and, among other things, sold horse blankets, buggy robes and dusters, whips, and collar pads: Held, in an action for breach of contract, that evidence showing that such articles did not belong to the saddlery and harness business, but were articles of general merchandise, was admissible to prove there was no breach of contract.—PRIOR v. DIGGS, Cal., 31 Pac. Rep. 155.

94. SALE—Rescission.—No such confidential or fiduciary relation exists between the officers of a corporation and the stockholders as will enable a stockholder to rescind a sale of his stock to the secretary, where the latter, at the time of his purchase, discloses all the information he has, and conceals nothing concerning the condition of the corporation or the value of its stock.—KRUMBHAAR v. GRIFFITHS, Pa., 25 Atl. Rep. 64.

95. SET-OFF—Insolvency.—A person holding a claim against one who has assigned for the benefit of his creditors cannot offset it against a demand of the insolvent estate on him, unless such claim was due at the time of the assignment.—FERA v. WICKHAM, N. Y., 31 N. E. Rep. 1028.

96. SPECIFIC PERFORMANCE — Contract. —Defendant, on advice of plaintiffs, purchased certain land, which plaintiff knew was to increase in value, and a contract was entered into by which defendant, on November 1st, was to convey to plaintiffs two-thirds of the land on payment of their proportion of the purchase price, taxes, and other expenses. If payment was not made on the date named, plaintiffs were to forfeit all claims to a conveyance of the property: Held, that time was not of the essence of the contract, and was a tender of payment on Novbember 26th was good, defendant not having notified plaintiffs of the amount due, or made request for payment.—MILLER v. COX, Cal., 31 N. E. Rep. 161.

97. SPECIFIC PERFORMANCE — Contract—Water Company.—Where a water company, under its contract with a city giving it an exclusive franchise, has established its plant, laid its water pipes in the streets, and private consumers have, at large expense, conducted the water into their houses, a provision of the contract making it the duty of the company to filter the water intended for domestic use will be specifically enforced at the suit of the city, as an action for damages by the private consumers would be wholly inadequate, and a forfeiture of the exclusive franchise of the company would entail on the city the needless expense of erecting new works.—CITY OF BURLINGTON v. BURLINGTON WATER CO., Iowa, 53 N. W. Rep. 246.

98. STATUTE—Title—County Boundary.—Act 1890, "to define the county line of Estill county," will not be declared unconstitutional on the ground that the title is misleading and deceptive, in that the legislature, instead of defining an uncertain boundary line, abandoned it altogether, and so changed the line as to take 160 voters and $175,000 of taxable property from Estill county, and transfer them to an adjoining county, since the legislature, having full power over the subject-matter, will be presumed to have used the word "define" in its enlarged, instead of its restricted sense. —WALTERS v. RICHARDSON, Ky., 20 S. W. Rep. 279.

99. SUBROGATION — Mortgage — Priorities.—One who loans money to satisfy several mortgages on property, and takes another mortgage on the property, without examining the records, and relying merely on an abstract not entirely up to date, which fails to notice the rendition of a recent judgment, is not entitled to subrogation under said mortgages to rights paramount to the judgment.—FT. DODGE BLDG. & LOAN ASS'N v. SCOTT, Iowa, 53 N. W. Rep. 283.

100. TAXATION—Exemption.—Whatever is gratuitously done or given in relief of the public burdens or for the advancement of the public good is a "purely public charity;" and therefore a religious denominational school, which does not limit the admission of pupils to children of members of its own denomination, though it gives a preference to such children, and which is not maintained for pecuniary profit, is within Const. art. 9, § 1, which empowers the legislature to exempt from taxation institutions of "purely public charity."— TRUSTEES OF ACADEMY OF PROTESTANT EPISCOPAL CHURCH v. TAYLOR, Penn., 25 Atl. Rep. 55.

101. TAXATION — Recovery of Taxes Paid.—Where a property owner, under protest, voluntarily pays an assessment authorized by law, he cannot recover the money paid, though he received no notice of the assessment.—NEWCOMB v. CITY OF DAVENPORT, Iowa, 53 N. W. Rep. 232.

102. TAXATION OF CATTLE ON RANGE.—Gen. St. ch. 94, § 22 *et seq.*, provides that stock ranging at large and not worked shall in all cases be returned and assessed in the county in which they are being herded and kept on the 1st of May in each year; that every assessor shall assess all personal property in his county on that day, and that each person owning property subject to taxation shall deliver to the assessor a correct list of same: Held, that stock ranging in a county on the 1st of May is legally assessable in that county; and the fact that

the owner sees fit to make return of such stock to the assessor of the county in which he lives, and to which the stock is each year driven back as to the "home ranch," affords him no ground for relief from the taxation in the first-mentioned county.—METCALF v. FISHER, Colo., 31 Pac. Rep. 175.

103. TOWNS—Annexation of Territory.—Under Code, § 421 *et seq.*, the original incorporation of towns is limited to cases in which the inhabitants of "any part of any county" are desirous of organization. The provisions relative to annexation of contiguous territory are without words indicating an enlargement of this power, while section 506, conferring criminal jurisdiction upon the mayors of towns, declares the same co-extensive only with the county in which such towns are situated: Held, not to authorize the annexation, by a town situated near a county line, of territory in an adjoining county.—TABOR & N. RY. CO. v. DYSON, Iowa, 53 N. W. Rep. 245.

104. TRADE-MARK—Infringement.—An injunction will not be granted to restrain the fraudulent use by defendant of a trade-mark claimed by plaintiff as its exclusive property, where plaintiff itself uses the trademark in part in violation of its established meaning, as a means of selling another product than that to which it can rightfully be applied, and to which the public have been and are led to believe it is alone applied.—PRINCE MANUF'G. CO. v. PRINCE'S METALLIC PAINT CO., N. Y., 31 N. E. Rep. 990.

105. TRIAL—Right to Open and Close.—When, in an action on a note on the issue made by the pleadings, the plaintiff would be required to prove any fact to entitle him to recover, he has the right to open and close. If, however, the defendant in his answer admits the plaintiff's cause of action, but sets up new matter, such as usury, for a defense, so that the defense would fail without proof of such new matter, the defendant is entitled to open and close.—SUITER v. PARK NAT. BANK OF CHICAGO, Neb., 53 N. W. Rep. 205.

106. TRUST—Bona Fide Purchaser—Unrecorded Deed.—Civil Code, § 1213, provides that every duly-recorded conveyance is constructive notice of the contents thereof to subsequent purchasers; section 1214 declares that every conveyance of real property is void as against any subsequent purchaser in good faith and for a valuable consideration, whose conveyance is first recorded; and section 1217 provides that an unrecorded instrument is valid as between the parties thereto and those who have notice thereof: Held, that an unrecorded deed by a trustee to a *bona fide* purchaser in possession in violation of the trust was not void as to all persons except the parties to it.—WARNOCK v. HARLOW, Cal., 31 Pac. Rep. 166.

107. TRUSTEE PROCESS.—Where a person is summoned as a trustee of defendant by reason of his holding a mortgage of record on property attached by plaintiff, the court may find the amount due the trustee on the mortgage, on the testimony of defendant as to the consideration of the mortgage, and that nothing had been paid thereon.—EATON v. NEWHALL, Mass., 31 N. E. Rep. 961.

108. VENDOR AND VENDEE—Assumpton.—Where land is purchased subject to a mortgage, and the amount of the mortgage has been retained by the purchaser out of the purchase price, he will be held to have assumed the payment of the mortgage, and is personally liable in an action to the mortgagee, under the rule that where a person makes a promise to another for the benefit of a third person such third person may maintain an action thereon.—BRISTOL SAV. BANK v. STIGER, Iowa, 53 N. W. Rep. 265.

109. VENDOR'S LIEN - Sale.—Under Civil Code, § 694, so providing, the whole of a tract of land cannot be sold to satisfy notes for the purchase money, unless all of them are due at the date of the judgment for the sale, though all the notes are held by the same person, but only so much of the land may be sold as is sufficient to satisfy the notes that are due; and if the property cannot be advantageously divided, none of it can be sold until all the notes fall due.—GENTRY v. WALKER, Ky., 20 S. W. Rep. 291.

110. WATER RIGHTS—Grant of Easement.—The grant of a right to lay pipe to a certain designated spring on the grantor's premises, and to convey all the water "of said spring" which can be taken through the pipe, and declaring the grantee entitled to "all the water" which can be taken through the pipe, does not carry with it the right to excavate, and so get water from neighboring springs to the full capacity of the pipe, but the right to take such water as may flow from the spring designated.—FURNER v. SEABURY, N. Y., 31 N. E. Rep. 1004.

111. WATERS — Obstruction of Stream.—Where the owner of land abutting on a non-navigable stream constructs an embankment in front of his premises, extending somewhat into the channel, and the embankment, although not obstructing the water in its ordinary flow, forces it during an unusual freshet on the land on the opposite shore, and so wears away the land, such owner is liable.—HARTSHORN v. CHADDOCK N. Y., 31 N. E. Rep. 997.

112. WILLS—Devastavit.—Where a co-devisee and colegatee, by virtue of his office as executor, gets possession of the personal estate of testator, and misappropriates it, the maxim that whoever disappoints the will shall forfeit his right under it, at least to the extent of the disappointment, will be applied.—ARMSTRONG v. WALKER, Penn., 25 Atl. Rep. 53.

113. WILLS—General and Specific Legacies.—Testator bequeathed to each of two daughters certain amounts "in United States government bonds." He left at death United States bonds to the aggregate amount of the legacies: Held, that the legacies were general, and payable in any bonds of the kind described.—EVANS v. HUNTER, Iowa, 53 N. W. Rep. 277.

114. WILL — Probate.—Where an inhabitant of the State dies, a decree of surrogate admitting his will to probate, founded on some evidence that testator was a resident of the county in which the surrogate has jurisdiction, is conclusive, except on direct review, and cannot be attacked in a collateral proceeding.—BOLTON v. SCHRIEVER, N. Y., 31 N. E. Rep. 1001.

115. WILLS—Spendthrift Trust.—Testatrix bequeathed all her property in trust to her brother, "to invest the same in such manner as in his opinion will produce the best income," and once in each year to pay over to her son the whole income during his life, and thereafter to his children or their descendants; and gave the trustee full power to sell all her estate, and invest the same as he deemed best: Held, not to create a "spendthrift trust" by restraining the right of alienation, and such income was assignable by the *cestui que trust*.—KINGMAN v. WINCHELL, Mo., 20 S. W. Rep. 296.

116. WILLS—Trusts—Legacy.—When a will gives a sum of money, after the payment of testator's debts, to the executor, in trust to invest the same in a certain class of securities, and pay the income to the beneficiary for life, the beneficiary is entitled to the income derived from the fund from the date of testator's death.—IN RE STANFIELD'S ESTATE, N. Y., 31 N. E. Rep. 1013.

117. WITNESS — Transaction with Decedent. — Under Civil Code, § 606, subsec 2, which provides that no person shall testify for himself concerning any verbal statement of, transaction with, or act done or omitted to be done by, one who is dead when the testimony is offered, the maker of a note, when sued by an indorsee, cannot, in support of his plea of no consideration, testify as to what took place between himself and the deceased payee concerning the execution and consideration of the note, though the indorsee has lost all recourse against the payee's estate, and it will not be affected by the determination of the action; the intention of the legislature being to prevent a party in all cases from testifying as to what was said or done by a decedent, whose version cannot be ascertained, concerning the issue to be tried.—HURRY v. KLINE, Ky., 20 S. W. Rep. 277.

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